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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION INC.,
POWERSMITH COGENERATION PROJECT
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), divest the state courts of jurisdiction to decide whether the holder of a valid FERC certificate must also comply with state law, and instead commit to FERC and the federal courts of appeal exclusive jurisdiction to adjudicate whether the FERC certificate is preemptive?

2. After a state court determines that it has jurisdiction over issues before it, and renders judgment on those issues, may a lower federal court enjoin enforcement of that judgment on the ground that the state court erroneously resolved the jurisdictional question?

PARTIES TO THE PROCEEDINGS

In the court below, Williams Natural Gas Company was the appellant; Smith Cogeneration, Inc. and Power-Smith Cogeneration Project Limited Partnership were intervenors-appellants; and Oklahoma Natural Gas Company and the City of Oklahoma City were appellees. The City of Oklahoma City did not participate in the proceedings in the court of appeals. As required by Rule 29.1 of the Rules of this Court, Oklahoma Natural Gas Company states that it is a division of ONEOK Inc. and that ONEOK Inc. has no parent company and no subsidiaries, except wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	11
I. SECTION 19(b) OF THE NATURAL GAS ACT DOES NOT COMMIT TO FERC AND THE FEDERAL COURTS OF APPEALS, TO THE EXCLUSION OF STATE COURTS, A CLAIM THAT A HOLDER OF A VALID FERC CERTIFICATE MUST COMPLY WITH STATE LAW	12
II. THE COURT OF APPEALS SHOWED AN IMPROPER DISREGARD FOR THE JUDGMENTS OF STATE COURTS BY ORDERING THAT ENFORCEMENT OF THE STATE JUDGMENT AND ACCOMPANYING INJUNCTION BE ENJOINED	22
CONCLUSION	28

TABLE OF AUTHORITIES

Cases Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 18
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 8, 23, 25
Central New England Ry. v. Boston & A R. Co., 279 U.S. 415 (1929) 16
Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 12, 13, 23, 24
Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) 25
City of Rochester v. Bond, 603 F.2d 927 (D.C. Cir. 1979) 10, 15, 22
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 10, 20, 21
Claflin v. Houseman, 93 U.S. 130 (1876) 13
Cook v. Pan American World Airways, Inc., 771 F.2d 635 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986) 20
County of Halifax, Va. v. Lever, 718 F.2d 649 (4th Cir. 1983) 22
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 24
Durfee v. Duke, 375 U.S. 106 (1963) 26
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 18
Grubb v. Public Utilities Comm'n of Ohio, 281 U.S. 470 (1929) 23
Hathorn v. Lovorn, 457 U.S. 255 (1982) 13
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 24
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 25
Juidice v. Vail, 430 U.S. 327 (1977) 24
Kalb v. Feuerstein, 308 U.S. 433 (1940) 26
Mansfield C. & L. M. Ry. v. Swan, 111 U.S. 379 (1884) 19
McCulloch Interstate Gas Corp. v. FPC, 536 F.2d 910 (10th Cir. 1976) 22
Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117 (D.C. Cir. 1989) 19

TABLE OF AUTHORITIES—Continued

Page

Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 887 F.2d 1295 (6th Cir. 1989) 19
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 18
New Orleans Public Service, Inc. v. Council of City of New Orleans, 109 S.Ct. 2506 (1989) 25, 27
Northwest Central Pipeline Corp. v. Corporation Comm'n of Kansas, 109 S.Ct. 1262 (1989) 18
Oklahoma Gas and Electric Co. v. Total Energy, Inc., 499 P.2d 917 (Okla. 1972) 3, 14
Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961) 13, 17, 18
Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n, 341 U.S. 329 (1951) 17, 18
Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana, 332 U.S. 507 (1947) 17, 18
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 23
Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 24
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) ..*passim*
Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 12, 17, 18
Tafflin v. Levitt, 110 S.Ct. 792, 58 U.S.L.W. 4157 (1990) 13
Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986) 18
United States v. Corrick, 298 U.S. 435 (1936) 19
United States by Donovan v. Howard Elec. Co., 798 F.2d 392 (10th Cir. 1986) 22
United States v. McBride, 788 F.2d 1429 (10th Cir. 1986) 22
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 24
Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965) 22
Younger v. Harris, 401 U.S. 37 (1971) 10, 12, 24

TABLE OF AUTHORITIES—Continued

Agency Cases Page

American Distribution Co., 28 FERC (CCH) ¶ 61,323 (1984) 4
Associated Natural Gas Co., 43 FERC (CCH) ¶ 61,304 (1988) 4
Williams Natural Gas Co., 46 FERC (CCH) ¶ 61,160 (1989) 2, 4
Williams Natural Gas Co., 47 FERC (CCH) ¶ 61,308 (1989) 2

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 8
Full Faith and Credit Act, 28 U.S.C. § 1738 ..... 10, 12, 23
Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z ..... *passim*
Section 1, 15 U.S.C. § 717 ..... 5, 15
Section 7, 15 U.S.C. § 717f 4, 15
Section 19, 15 U.S.C. § 717r ..... *passim*
Section 22, 15 U.S.C. § 717u 17
Federal Power Act, 16 U.S.C. § 791a *et seq.* 21
Section 9, 16 U.S.C. § 802 21
Anti-Injunction Act, 28 U.S.C. § 2283 ..... 8, 10, 12, 25
Bank Holding Company Act, § 7, 12 U.S.C. § 1846 .. 22
Oklahoma Declaratory Judgment Act, 12 Okla. Stat. 1981, § 1651 4

Oklahoma Constitution

Okla. Const., art. 18, § 5(a) 2
Okla. Const., art. 18, § 7 3

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LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Oklahoma Natural Gas Company petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 890 F.2d 255. The orders of the Oklahoma state court (App., *infra*, 22a-30a), enforcement of which the court of appeals concluded should be enjoined, are not reported. The pertinent orders of the United States District Court for the Western District of Oklahoma (App., *infra*, 31a-44a) are not reported. The order of the Federal Energy Regulatory Commission issuing the certificate of public convenience and necessity (App., *infra*, 45a-61a) and the order denying rehearing

(App., *infra*, 62a-74a) are reported at 46 FERC (CCH) ¶ 61,160 and 47 FERC (CCH) ¶ 61,308.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1989. App., *infra*, 1a. A timely filed petition for rehearing was denied on December 27, 1989. App., *infra*, 75a-76a. *See also* App., *infra*, 77a-78a (nunc pro tunc corrective order issued January 5, 1990). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Natural Gas Act of 1938, as amended, 15 U.S.C. §§ 717-717z, are reprinted in Appendix H to this petition. App., *infra*, 100a-107a. The provisions of 28 U.S.C. § 1738 and 28 U.S.C. § 2283, as well as the Oklahoma Declaratory Judgment Act and the Oklahoma Constitution's provisions regarding local franchises, are reprinted in Appendix I. App., *infra*, 108a-110a.

STATEMENT OF THE CASE

This case involves questions about the lower federal courts' power to interfere with state courts' adjudication of certain cases involving state-law claims and preemption defenses.

Petitioner Oklahoma Natural Gas Company brought suit in state court alleging that respondent Willliams Natural Gas Company could not construct and operate a proposed pipeline in Oklahoma City, Oklahoma, without complying with a state-law requirement. Williams subsequently applied for and received a certificate of public convenience and necessity for the pipeline from the Federl Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA), 15 U.S.C. § 717f. The state court accepted Oklahoma Natural's state-law claim. When Williams asked a federal district court to bypass the

state-court proceeding and to rule that the state-law requirement was preempted, the district court ultimately declined to do so, because Williams had presented the preemption issue as a defense in the state-court action, and the state court had by that time found that it had jurisdiction and rejected the defense. The district court refused to enjoin the state-court order.

The court of appeals reversed. It held that the Natural Gas Act divested the state court of jurisdiction to adjudicate petitioner's case and instead granted FERC (and a federal appeals court reviewing FERC's decision) exclusive jurisdiction to decide the preemptive effect of FERC certificates. The court of appeals directed the district court to enjoin enforcement of the state court order requiring Williams to comply with state law.

1. Petitioner is the long-time distributor of natural gas to the citizens of Oklahoma City, Oklahoma. To provide that service, petitioner obtained, and has long held, a franchise from the city to use the public streets for that purpose. In 1988, Smith Cogeneration, Inc. and PowerSmith Cogeneration Project Limited Partnership (collectively, "PowerSmith"), which were nearing completion of a large facility in Oklahoma City, contracted with Williams to transport natural gas directly to the new facility, thus bypassing petitioner's local distribution facilities. Construction, maintenance, and operation of the pipeline that was needed to reach PowerSmith required that Williams use the public streets of Oklahoma City. The several cases pertinent to this petition involve Williams' efforts to construct and to operate that pipeline without obtaining the necessary franchise from Oklahoma City.[1]

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[1] Under Oklahoma law, franchises are not exclusive. Okla. Const., art. 18, § 7. App., *infra*, 110a. The voters of a city may approve "as many competing franchises as they deem[] necessary." *Oklahoma Gas and Electric Co. v. Total Energy, Inc.*, 499 P.2d 917, 924 (Okla. 1972). A company must obtain a franchise to use local

When it became clear that Williams did not intend to apply for a city franchise, petitioner filed suit in Oklahoma state court under the Oklahoma Declaratory Judgment Act, 12 Okla. Stat. 1981, § 1651. *See* App., *infra*, 81a-86a (petition filed October 18, 1988). Petitioner asked the court to rule that Williams could not use local streets to serve PowerSmith in Oklahoma City unless it first obtained a franchise. At that time, petitioner could not be certain that Williams would seek a FERC certificate for the pipeline,[2] but petitioner's claim that Williams must obtain a franchise in no way depended on whether Williams also obtained a valid FERC certificate. App., *infra*, 81a-86a.

Shortly thereafter, on October 28, 1988, Williams applied to FERC for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to construct and to operate a twelve-mile pipeline to serve PowerSmith. In that proceeding, petitioner urged FERC not to issue the certificate for two main reasons. First, petitioner argued that

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streets to serve a local customer if another company is already serving the same community under a franchise. *Id.*

[2] A company like Williams that is "an interstate pipeline company" within the NGA jurisdiction of FERC may engage in activities that are outside FERC's jurisdiction. *Associated Natural Gas Co.*, 43 FERC (CCH) ¶ 61,304, at 61,836 (1988). In addition, Section 1(c) of the NGA specifically provides that, to the extent that an interstate pipeline company receives gas within or at the boundary of a state for ultimate consumption within that state, it may be exempted from FERC jurisdiction without any action or declaration by the agency. 15 U.S.C. § 717(c); *American Distribution Co.*, 28 FERC (CCH) ¶ 61,323, at 61,596 n.4 (1984). Because Oklahoma is a major gas-producing state, the proposed natural gas service to PowerSmith could well have been set up as an intrastate transaction. In fact, Williams, PowerSmith, and the sellers of the gas agreed to pursue an intrastate arrangement in the event that FERC denied the requested interstate certificate. *Williams Natural Gas Co.*, 46 FERC (CCH) ¶ 61,160, at 61,558 n.11 (1989); App., *infra*, 51a.

the pipeline was outside FERC's regulatory jurisdiction under Section 1 of the NGA, 15 U.S.C. § 717, because it was essentially local distribution rather than interstate transportation. Second, petitioner argued that, even if the pipeline were within FERC's Section 1 jurisdiction, its construction and operation did not meet the Section 7(c) standard of public convenience and necessity. *See* App., *infra*, 4a; Motion to Intervene, Protest and Motion to Dismiss of Oklahoma Natural, pp. 3-8 (Nov. 29, 1989).

Meanwhile, on November 10, 1988, Williams filed an answer in the state-court action. As subsequently elaborated in an amended answer and a motion for summary judgment (filed after FERC issued the certificate), Williams' defenses included three principal arguments: first, that the franchise requirement did not apply as a matter of state law; second, that the requirement was preempted by the NGA; and third, that the state court lacked jurisdiction over the case because the suit was essentially a collateral attack on the FERC certificate. *See* App., *infra*, 87a-92a; Williams' Motion for Summary Judgment and Brief in Support Thereof, pp. 16-19 (May 12, 1989).[3]

2. On February 16, 1989, the state court issued the first of its two orders that are relevant here. In that order, the court held that state law required Williams to obtain a franchise as a prerequisite to using the streets of Oklahoma City to transport gas to PowerSmith within the city limits. App., *infra*, 22a-25a. The state court specifically reserved for later consideration whether the state-law requirement was preempted by federal law. *Id.* at 24a.

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[3] In its amended answer, Williams acknowledged that its pipeline would be subject to some state laws even if it obtained the FERC certificate. App., *infra*, 89a (stating that its pipeline would be "subject only to compliance with environmental, safety and similar requirements of local concern").

On the same day, FERC awarded Williams its Section 7(c) certificate. App., *infra*, 45a-61a. The Commission decided the Section 1 jurisdictional issue against Oklahoma Natural, holding that the proposed facility involved transportation of natural gas in interstate commerce and that it was not a facility used for the "local distribution" of natural gas. App., *infra*, 52a-55a. Without a hearing, the Commission also rejected petitioner's several arguments that Williams' proposed pipeline did not meet the statutory standard of public convenience and necessity. *Id.* at 55a-61a.

3. On March 28, 1989, six weeks after the adverse decision on the franchise issue in state court, Williams filed the present action in federal district court against the City of Oklahoma City, seeking to condemn the property necessary for the proposed pipeline pursuant to Section 7(h) of the NGA, 15 U.S.C. § 717f(h). App., *infra*, 93a-99a. In the same suit, Williams included an ancillary cause of action against Oklahoma Natural, seeking to quiet title to the condemned property with respect to Oklahoma Natural's assertion of countervailing franchise rights. *Id.* at 97a-99a. Williams' claim against Oklahoma Natural in federal court thus raised (1) the franchise issue that had already been decided against Williams in state court and (2) the federal preemption defense then being litigated in the state-court suit.

On April 18, before Oklahoma Natural had filed its answer, the federal district court approved an interlocutory order granting Williams immediate possession of the easements sought to be condemned. App., *infra*, 33a-34a. With the agreement of Williams, that order was limited to possession for the purpose of construction—but not operation—of the pipeline. The question of preemption of Oklahoma Natural's franchise rights was reserved for later decision. *Id.* at 31a-32a.

On April 28, the state court temporarily restrained Williams from constructing the pipeline. That order was

promptly enjoined by the federal district court. App., *infra*, 36a-37a (order of May 1, 1989). The federal court's ruling permitted Williams to continue the construction of the pipeline, as previously authorized on April 18. The court made clear, however, that it would not interfere with the state court's consideration of the issue of federal preemption of the state franchise requirement: "The issue of pre-emption having been first presented to the State court, this Court will not proceed to decide that issue in advance of the state court decision on the issue if that be made within a reasonable time." *Id.* at 37a.

On May 19, the state court entered its final order—a declaratory judgment in favor of Oklahoma Natural. App., *infra*, 26a-30a. Notwithstanding Williams' argument that the state-court action was barred as a collateral attack on the FERC certificate, which could be reviewed only in a federal court of appeals under Section 19(b) of the NGA, 15 U.S.C. § 717r(b), the state court concluded that it had jurisdiction to decide the issues, relying on this Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). App., *infra*, 28a & n.4. The court also accepted petitioner's argument that, even if Williams' pipeline was within FERC's jurisdiction under NGA Section 1, the Oklahoma franchise requirement applied, because the NGA did not oust states of authority to regulate matters of local concern, such as the use of public streets. App., *infra*, 28a-30a; *id.* at 29a n.7 (citing report entitled "Regulation of Gas Utility Bypass: A Case for Concurrent Jurisdiction"). In aid of its judgment, the state court enjoined Williams from operating its now-completed pipeline unless it first obtained the required local franchise from the city and its voters. App., *infra*, 30a.

Williams challenged the state court ruling in two ways. In July 1989, it filed an appeal in the Oklahoma Supreme Court (which is still pending). *Smith Cogener-*

ation, Inc. v. Oklahoma Natural Gas Co., No. 73,649 (Okla., filed July 18, 1989). Even before it filed its state-court appeal, however, Williams returned to the federal court, asking for an injunction against enforcement of the state court order. On May 30, the federal district court denied Williams' motion. App., *infra*, 39a-44a. The court declined to decide the preemption question, holding that, under the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), it was barred from "acting as an appellate court for purpose of overriding a state court judgment." App., *infra*, 41a.[4] The court certified the question for immediate appeal under 28 U.S.C. § 1292(b). App., *infra*, 44a.

The next day, FERC denied Oklahoma Natural's request for rehearing. App., *infra*, 62a-74a. In a footnote, the Commission noted and expressed disagreement with the state court ruling on the preemption question, although FERC did not suggest that the issue was before it for consideration. *Id.* at 65a n.5. In fact, the Commission specifically recognized that the issues previously pending in the state court were quite separate from those presented in the FERC proceeding:

> As previously indicated, a determination by the state court as to whether or not [Williams] requires authorization under the franchise law to install the pipeline in Oklahoma City *has no bearing on our determination* of whether the [pipeline] is in the public convenience and necessity. Should the state court determine that [Williams] needs authorization under the franchise law, the issue *will be* whether or not that determination is preempted by our certificate authorization.

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[4] The court also cited *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), in which this Court held that the Anti-Injunction Act, 28 U.S.C. § 2283, barred a federal district court injunction against enforcement of a state court order in a case presenting a preemption defense.

App., *infra*, 72a (emphasis added). Oklahoma Natural filed a petition to review FERC's decision issuing the certificate of public convenience and necessity in the Court of Appeals for the District of Columbia Circuit, pursuant to Section 19(b) of the NGA, 15 U.S.C. § 717 (b). *Oklahoma Natural Gas Company v. FERC*, Case No. 89-1376 (D.C. Cir., filed June 12, 1989).[5]

4. The Court of Appeals for the Tenth Circuit reversed the district court's refusal to enjoin enforcement of the state court order, concluding that "the state court lacked jurisdiction to entertain a collateral challenge to the FERC certificate." App., *infra*, 3a. Despite contrary urgings by Williams, the court expressly declined to reach the substantive preemption question whether FERC's regulatory authority over Williams' pipeline excludes application of the state franchise law. *Id.* at 8a-9a. Instead, the court ruled that the state court was deprived of jurisdiction by Section 19(b) of the NGA, which grants the federal courts of appeals, on a petition for review of FERC orders, exclusive jurisdiction to review a FERC certificate. App., *infra*, 9a-18a.[6]

Although petitioner's claim in state court was that Williams was required to obtain a local franchise *in addition to* any FERC certificate it might receive, the court of appeals treated petitioner's claim in state court as if it sought to "affirm, modify, or set aside" the FERC certificate. Thus, the court viewed the state-court case as presenting essentially the same challenge to FERC's jurisdiction under Section 1 of the NGA that petitioner

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[5] Neither that appeal nor the appeal in the state supreme court has yet been argued.

[6] Concluding that "[j]udicial review under § 19(b) is exclusive in the courts of appeals once the FERC certificate issues," App., *infra*, 12a, the Tenth Circuit viewed both itself and the district court in this condemnation action as lacking jurisdiction to decide the merits of the preemption question, as Williams asked them to do. App., *infra*, 17a, 18a.

presented to FERC. App., *infra*, 14a ("however characterized, the state court's consideration of the preemption issue ultimately challenges FERC's determination of its own jurisdiction"); *id.* at 14a-16a. Extensively relying on this Court's decision in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the court of appeals throughout its opinion characterized petitioner's claim in state court as a prohibited "collateral attack" on the "lawfulness" of the certificate. App., *infra*, 11a-13a, 16a-18a; *see* App., *infra*, 14a (quoting D.C. Circuit's ruling in *City of Rochester v. Bond*, 603 F.2d 927, 936 (1979), that "insofar as [a claim] may affect the lawfulness of a directly appealable order," the claim must be raised on direct appeal of the agency order). Saying that petitioner "could have and should have raised the preemption issue before FERC," App., *infra*, 17a, the court of appeals, without further analysis, concluded that the state court ruling must therefore be enjoined. *Ibid.* ("Thus, the federal district court erred in refusing to enjoin the enforcement of the state court injunction.")

Finally, the court rejected the argument that the *Rooker* doctrine prohibited the district court from reviewing the state court's ruling. App., *infra*, 18a-21a.[7] The court stated: "Just as the federal courts lack jurisdiction to review the decisions of the state courts, so also must state courts defer to the federal appellate process mandated by Congress. What is sauce for the goose is also sauce for the gander." App., *infra*, 19a (footnote omitted). In the court's view, because the state court considered the preemption question "only after the FERC certificate issued and after the exclusive judicial review provisions of § 19 attached," "the deference afforded the

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[7] The court of appeals did not separately discuss whether requiring the district court to enjoin enforcement of the state-court order was consistent with the Full Faith and Credit Act, 28 U.S.C. § 1738, with the Anti-Injunction Act, 28 U.S.C. § 2283, or with the absention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971).

decisions of state courts under *Rooker* [was] not warranted" here. App., *infra*, 20a, 21a.[8]

REASONS FOR GRANTING THE WRIT

The decision below in this case places a new, and wholly unjustified, limit on the power of state courts to decide cases arising under state law. The Tenth Circuit has determined that the Natural Gas Act bars a state court from deciding whether a company, having been awarded a certificate of convenience and necessity by FERC, must also comply with state law before operating a pipeline. According to the court of appeals, the issues of state law—as well as the issue of whether state law has been preempted—can be raised only before FERC and, subsequently, before a federal court of appeals reviewing the FERC decision. As a result, to prevent a "collateral attack" on the order granting the certificate, the court directed that the state court's judgment and accompanying injunction be enjoined.

This cutback in the authority of state courts finds no basis whatsoever in the Natural Gas Act. The issue before the Oklahoma courts in this case is *not* whether respondent had obtained a valid certificate from FERC but whether—assuming that it had—it was also required to comply with franchising requirements under state law. Nothing in the Natural Gas Act commands that a party appearing before FERC not only oppose issuance of a certificate but also, to the exclusion of other tribunals, raise questions about the effect of the certificate (if issued) upon any requirements of state law. Whether state law applies, and whether it is preempted, are matters distinct from, and independent of, the validity of the

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[8] On December 27, 1989, the court of appeals denied rehearing. App., *infra*, 75a-76a. On January 12, 1990, the court of appeals stayed issuance of its mandate pending review by this Court if a petition for a writ of certiorari is filed on or before February 12, 1990. App., *infra*, 79a-80a.

certificate. For that reason, such issues can be, and often have been, raised and decided in proceedings other than those regarding the issuance of the certificate itself. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

The Tenth Circuit, by its broad holding, has worked an unwarranted expansion of FERC authority at the expense of state courts. Moreover, by its order to enjoin the state proceedings, it has disregarded a variety of related doctrines restricting interference with actions in state court. *See* 28 U.S.C. §§ 1738, 2283; *Younger v. Harris*, 401 U.S. 37 (1971); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Here, the state court expressly determined that it had jurisdiction over petitioner's state-law claim. While the court of appeals may have disagreed with that conclusion, that disagreement does not justify its decision to interfere; rather, state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (internal quotes omitted). The refusal of the court of appeals to adhere to that standard—a refusal based on a serious misreading of the Natural Gas Act—is important and warrants review by this Court.

I. SECTION 19(b) OF THE NATURAL GAS ACT DOES NOT COMMIT TO FERC AND THE FEDERAL COURTS OF APPEALS, TO THE EXCLUSION OF STATE COURTS, A CLAIM THAT A HOLDER OF A VALID FERC CERTIFICATE MUST COMPLY WITH STATE LAW.

The decision of the court of appeals rested on one, and only one, ground: that Section 19(b) of the Natural Gas Act stripped the state court of jurisdiction to adjudicate petitioner's case. Absent that limitation, it is beyond serious question that under all of the ordinary jurisdic-

tional rules, the state court was entitled to hear that case. Petitioner's claim raised a question of state law, which the state court was uniquely competent to decide. Although respondent Williams' defense of preemption raised a question of federal law, this Court has long made clear that, absent a clear congressional statement to the contrary, the state courts are fully competent and presumptively entitled to decide such questions, with federal court review of the federal law rulings available only in this Court after exhaustion of state court appeals.[9] But the court of appeals read Section 19(b) to effect a sharp break with that normal pattern, concluding that the provision embodied a clear congressional mandate to divest the state court of jurisdiction and instead to commit the issues—or at least the defense of preemption—exclusively to FERC and to the federal court of appeals reviewing FERC's decision.[10] That ruling is incorrect and unprecedented; Section 19(b) does not work so extraordinary a divestiture of state court jurisdiction.

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[9] *E.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 266-67 (1982); *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 663 (1961); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876).

As this Court recently made clear, even if a suit arises under federal law, the state courts would have authority, and be presumed competent, to adjudicate the suit, unless Congress has affirmatively ousted the state courts of jurisdiction over the federal claim. *Tafflin v. Levitt*, 110 S. Ct. 792, 58 U.S.L.W. 4157, 4158 (1990). At least as high a standard of affirmative congressional ouster of state-court jurisdiction must apply where the state-court action is based on state law and the only federal question is a defense.

[10] In requiring that petitioner present its claim to the court of appeals reviewing the FERC certificate decision, the Tenth Circuit required that petitioner first present that claim to FERC, because Section 19(b) limits judicial review to claims that have been presented to FERC. *See* App., *infra*, 17a.

1. The language of Section 19(b) is clear and straightforward. When the Commission has entered an order on an application for a certificate of public convenience and necessity under Section 7(c), Section 19(b) permits the filing in certain federal courts of appeal of a petition for review "praying that the order of the Commission be modified or set aside in whole or in part." The provision then declares that the court of appeals has exclusive jurisdiction "to affirm, modify, or set aside" the Commission's order. The claim that petitioner made in state court, however, simply does not seek that relief. Petitioner's claim is that the state franchise law applies to Williams' pipeline even if Williams receives a valid FERC certificate—that is, even if FERC has jurisdiction over the proposed pipeline and even if FERC properly determines that the pipeline meets Section 7(c)'s "public convenience and necessity" standard.[11] Petitioner's claim does not seek to "modify" or "set aside" the FERC certificate, but assumes the certificate's validity and urges that Williams must comply with an *additional* requirement. Right or wrong, preempted or not, petitioner's state-law claim therefore is not covered by Section 19(b).[12]

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[11] The Oklahoma franchise law does not require that those companies subject to it be regulated in any respect as public utilities. *Oklahoma Gas and Electric Co. v. Total Energy, Inc.*, 499 P.2d 917 (Okla. 1972). The franchise is simply authority for a company to use local streets to serve local customers regardless of whether the company is regulated as a utility. 499 P.2d at 919-20. Unless public streets "are used, a franchise is not necessary." 499 P.2d at 921. Accordingly, by seeking under its state claim to apply the Oklahoma franchise requirement to Williams, petitioner does not seek to challenge FERC's jurisdiction over Williams as a regulated interstate pipeline.

[12] The court of appeals suggested at one point that its conclusion turned on the fact that "FERC issued its certificate order before the state court entertained the issue of federal jurisdiction or preemption." App. *infra*, 9a. That fortuity of timing is wholly irrelevant to the proper application of Section 19(b). The timing of

The court of appeals reached an incorrect result because it mistakenly treated petitioner's claim in state court as the same, for purposes of Section 19(b), as the claims petitioner made in the FERC proceeding.[13] Before FERC, petitioner argued that the pipeline was not within FERC's jurisdiction under Section 1 of the NGA, 15 U.S.C. § 717, and that, in any event, the requested certificate should not issue because the project was not in the public convenience and necessity, as required by NGA Section 7(c), 15 U.S.C. § 717f(c). There is no doubt, and it is undisputed, that those claims are challenges to the issuance of the certificate itself and must therefore be presented to FERC and to the reviewing court under Section 19(b). But it is a very different matter to al-

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FERC's order does not alter the character of petitioner's state-law claim, which, regardless of when FERC issues its certificate, is not an attempt to modify or set aside the FERC order. And it makes no sense to make the obligation to raise an issue in a Section 7(c) certificate proceeding turn on the eventual timing of FERC's ruling in that proceeding. Nor does it make sense to construe Section 19(b) so as to encourage FERC and state courts to engage in a race to decision.

[13] Thus, the entire analysis of the court of appeals rests on its treatment of petitioner's state-court claim as if it were a challenge to the validity of the FERC certificate. The court characterized petitioner's state-court claim as a "collateral attack" on the validity of the FERC certificate. App., *infra*, 13a; see *id.* at 13a-14a, 17a-18a. The court described the arguments petitioner made to FERC—concerning FERC's jurisdiction under Section 1 of the NGA and the public convenience and necessity under Section 7(c)—as the same as "the preemption argument in everything but name." App., *infra*, 15a. The court said that the state-court claim "ultimately challenges FERC's determination of its own jurisdiction." App., *infra*, 14a. In quoting from *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979), the court viewed petitioner's state-court claim as one that " 'may affect the *lawfulness* of a directly appealable order' " of FERC. App., *infra*, 14a (emphasis added). The court concluded that petitioner's state-court claim raised a "dispute[] arising under the Natural Gas Act" (App., *infra*, 17a) and attacked "the substance and validity of [the] FERC order" (App., *infra*, 18a).

lege, as petitioner did in state court, that Williams must comply with the state franchise law even if it obtained a valid FERC certificate. That claim does, of course, raise a question about the *legal effect* of the FERC certificate—whether the certificate is sufficient to authorize Williams' pipeline notwithstanding Williams' failure to comply with the state franchise law. But, unlike the arguments made to FERC, the claim does not raise any issue bearing on the *validity* or *lawfulness* of the FERC certificate.

This Court noted very much the same distinction in *Central New England Ry. v. Boston & A.R. Co.*, 279 U.S. 415 (1929), where the Court rejected a challenge to state-court jurisdiction under a similar statutory scheme. There, although Congress had provided for exclusive federal review of orders issued by the Interstate Commerce Commission, the Court found that a state-court suit in breach of contract for railroad service was not a suit to "enjoin, set aside, annul or suspend" the ICC order authorizing abandonment of that service. *Id.* at 420-21. The Court stated: "The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms." *Id.* at 421. In this case, however, the court of appeals treated a suit regarding "the legal effect" of the FERC certificate as though it did "contest[] its validity." [14] The unfortunate result of

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[14] In equating the validity with the effect of a FERC certificate, as well as in equating the preemption question with the question of FERC jurisdiction, the court of appeals seems implicitly to have decided that a valid FERC certificate automatically has preemptive effect. The court's analysis therefore seems to answer the preempton question on the merits, even though the court expressly held that it would not and could not resolve the preemption question because only the D.C. Circuit in its Section 19(b) review had jurisdiction to do so. *See* App., *infra*, 8a-9a, 18a. In fact, it is plain that obtaining a FERC certificate does not automatically exempt a pipeline from state regulation, but that preemption de-

that error is to deny state court jurisdiction when Congress had no intention to do so.[15]

2. The court of appeals' view that the NGA ousts state courts of jurisdiction over cases like petitioner's—and commits preemption issues exclusively to Section 19(b) review proceedings—is directly contrary to the precedent of this Court. First, it conflicts with this Court's ruling in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), a case much like the present. There, a pipeline brought suit in state court to recover alleged overpayments to producers on state-law theories of contract and unjust enrichment. The defendant, in addition to alleging preemption of those claims by NGA regulatory authority over the producers' filed rates, argued that the state court lacked jurisdiction because the suit was in reality one either to enforce a filed rate (hence within exclusive district court jurisdiction under Section 22 of the NGA, 15 U.S.C. § 717u) or to challenge a filed rate (hence within exclusive court of appeals jurisdiction under Section 19, 15 U.S.C. § 717r). The Court rejected the jurisdictional

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pends on the particular state measure at issue. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329 (1951); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507 (1947). Even Williams conceded this in its amended answer. *See* note 3, *supra*.

[15] To the extent that the court of appeals appears to suggest that the state court lacked jurisdiction, not over petitioner's claim, but only over the preemption defense, that suggestion is insupportable. First, it is inconsistent with the court's own holding that the state court's injunction must be enjoined, for that injunction is, of course, perfectly proper if the defense of preemption is barred. In any event, we know of no precedent for the idea that a state court is entitled to adjudicate only half of a case—to rule on the plaintiff's claim but not the defendant's defense. Nothing in Section 19(b) or in practice or precedent requires FERC, in awarding a certificate, to issue an anticipatory ruling on the preemptive effect of that certificate, or requires that the certificate applicant's argument for preemption be raised by an adverse party.

challenge, observing that the pipeline's claims under state law were not—and the Court was not entitled to recharacterize them to be—efforts either to "enforce [a] liability or duty" under the NGA (Section 22) or to "modify" or "set aside" a filed rate (Section 19). The Court thus concluded that neither Section 19 nor Section 22 of the NGA, nor concerns about uniformity of natural gas regulation, deprived the state court of jurisdiction over the suit, even though a federal NGA preemption defense was at issue. 366 U.S. at 662-66. So it is here: notwithstanding the presence of a preemption defense in the state court action, the state court has jurisdiction over petitioner's case because petitioner's claim, based on state law, is not one to "modify" or "set aside" a FERC certificate within the coverage of Section 19(b).

Second, and perhaps even more significant, the regular practice of this Court and lower federal courts is inconsistent with the Tenth Circuit's view that the preemptive effect of a FERC certificate may be litigated only in Section 19(b) review proceedings. Thus, this Court has repeatedly exercised jurisdiction to decide preemption questions raised by FERC's orders, including awards of Section 7(c) certificates, in cases other than Section 19(b) review proceedings—that is, in cases filed in state court or in federal district court. *See Northwest Central Pipeline Corp. v. Corporation Comm'n of Kansas*, 109 S.Ct. 1262, 1272-73, 1277 n.14 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. at 298, 302; *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 414-15, 423 n.5 (1986); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 180 (1983); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 574-75 (1981); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 332 (1951); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 510 (1947); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 961-62 (1986). Those decisions necessarily establish the jurisdiction of both this Court and

the lower courts to decide the preemption question outside the Section 19(b) context.[16]

The lower courts, too, have exercised jurisdiction to decide preemption questions outside Section 19(b) review proceedings, and have carefully distinguished the substantive preemption question (*i.e.*, whether application of certain state laws to a FERC-certificated project is preempted) from the question of FERC jurisdiction to issue a certificate. For example, in *Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117 (D.C. Cir. 1989), the D.C. Circuit considered a Section 19(b) appeal from a FERC certificate proceeding under Section 7(c) of the NGA. After finding that FERC had jurisdiction to issue a certificate, the court specifically distinguished the preemption question: "To what extent this works a preemption of state regulation is not the subject of the present petition for review, and we need not discuss it." 883 F.2d at 122. This preemption question then was considered in a separate action in federal district court (consolidated with a case initially filed in state court). The Sixth Circuit in that action ruled on the merits of the preemption question without ever suggesting that it or the district court (or state court) lacked jurisdiction because the preemption issue should have been raised before FERC. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989).

It appears, in fact, that even FERC itself does not share the Tenth Circuit's view of the scope of Section 19(b). In the very proceeding at issue here, FERC specifically recognized that there was a distinction between the questions of its regulatory jurisdiction under NGA Section 1 and of the public convenience and necessity un-

[16] It is fundamental that this Court is without jurisdiction to decide the merits of any question that the lower courts lacked jurisdiction to decide. *See United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mansfield C. & L. M. Ry. v. Swan*, 111 U.S. 379, 382-83 (1884).

der NGA Section 7(c), on the one hand, and the question of preemption of any assertedly applicable state law requirement, on the other. FERC explained that the preemption question had not yet arisen and would not arise until after a state court determined that the state franchise law applied. App., *infra*, 72a.[17] Then, in a brief to the Tenth Circuit in this case (which is not a Section 19 review proceeding), FERC urged the court of appeals to rule on the merits of the preemption question, something that the Tenth Circuit concluded that it could not do because the issue was committed exclusively to the jurisdiction of the D.C. Circuit under Section 19(b). *See* Brief of FERC at Amicus Curiae, pp. 6-8 (presenting substantive, not jurisdictional, arguments that application of the state's franchise law is preempted by the NGA).

3. In reaching its conclusion, the court of appeals relied chiefly on *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), but that reliance is misplaced for two reasons. First, the Court there held only that, when a question of federal preemption had actually been presented and decided in a Federal Power Commission (FPC) license proceeding as well as on judicial review of the FPC order, that question could not be relitigated in a subsequent state court suit. *See Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 641 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986). In the present case, of course, the question of preemption was not

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[17] "[A] determination by the state court as to whether or not [Williams] requires authorization under the franchise law to install the pipeline in Oklahoma City has no bearing on our determination of whether the [pipeline] is in the public convenience and necessity. Should the state court determine that [Williams] needs authorization under the franchise law, the issue will be whether or not that determination is preempted by our certificate authorization." FERC made this statement in the same order in which it gratuitously opined that the state franchise law was preempted. *See* App., *infra*, 65a-66a n.5.

presented to FERC or on Section 19 review, so there can be no *issue* preclusion of the sort on which *Tacoma* was based. *Tacoma*'s holding was not one of *claim* preclusion, the concept applied by the Tenth Circuit here. *Tacoma* did not hold that state-court adjudication of a state-law claim like petitioner's is foreclosed if it has not been raised before the agency.

Second, and in any event, *Tacoma* did not involve the NGA. It involved the Federal Power Act, 16 U.S.C. § 791a *et seq.*, a statute that is different from the NGA in a critical respect. Section 9 of the Federal Power Act, 16 U.S.C. § 802—which is central to the *Tacoma* court's reasoning, *see* 357 U.S. at 326 n.9, 337 and n.17—requires the license applicant to give satisfactory evidence of compliance with applicable state law. That provision necessarily places before the agency (the FPC at the time of *Tacoma*, now FERC) the question of preemption of at least some state laws.[18] Under the Federal Power Act, therefore, the applicant must raise certain state law issues to the agency, and the validity of the certificate may turn in part on whether certain state law requirements are preempted. The NGA contains no provision like Section 9 of the Federal Power Act. Nothing in the NGA makes the validity of a FERC certificate turn on the answer to preemption questions, let alone requires a party opposing the certificate applicant to raise a state-law claim that does not allege a ground for not issuing the certificate or to anticipate a preemption argument on behalf of the applicant. In short, *Tacoma* does not support the Tenth Circuit's view that Section 19(b) of the NGA requires that FERC be presented with a state-law claim like petitioner's.[19]

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[18] Even in that setting, as Justice Harlan pointed out in concurrence, the Court did not hold that all questions of state law must be presented to the agency. 357 U.S. at 342.

[19] None of the other decisions cited by the court of appeals lends its conclusion any greater support. Every one of the circuit court decisions cited by the Tenth Circuit (App., *infra*, 10a-15a) in-

There are few matters of more importance to litigants than certainty about where to file a particular claim. The Tenth Circuit has now undermined that certainty for proceedings affected by the NGA, placing a limit on state-court jurisdiction that is not only contrary to the language of the Act but inconsistent with both precedent and common practice. Further review is needed.

II. THE COURT OF APPEALS SHOWED AN IMPROPER DISREGARD FOR THE JUDGMENTS OF STATE COURTS BY ORDERING THAT ENFORCEMENT OF THE STATE JUDGMENT AND ACCOMPANYING INJUNCTION BE ENJOINED.

The Tenth Circuit, having decided that the Oklahoma courts were ousted of jurisdiction over petitioner's suit, went on to declare that the district court should have enjoined enforcement of the state court's judgment. App., *infra*, 18a. The court of appeals reached this conclusion notwithstanding the facts, first, that the state court had already entered judgment and, second, that in so doing, the state court had expressly determined that it *did* have jurisdiction.[20] This affront to the state courts was wrong

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volved a challenge to the validity or lawfulness of the agency order at issue—not, as here, a claim that state law also applied to the holder of a valid agency license or certificate. *See McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910 (10th Cir. 1976); *United States by Donovan v. Howard Elec. Co.*, 798 F.2d 392 (10th Cir. 1986); *United States v. McBride*, 788 F.2d 1429 (10th Cir. 1986); *County of Halifax, Va. v. Lever*, 718 F.2d 649 (4th Cir. 1983); *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979). And the statute at issue in *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 424-45 (1965), included a provision that, like Section 9 of the Federal Power Act, placed before the federal agency certain issues concerning the application of state law. Bank Holding Company Act, § 7, 12 U.S.C. § 1846. As we have noted, the NGA contains no comparable provision.

[20] The state court made this determination in the face of respondents' extensive argument that the federal courts of appeals had exclusive jurisdiction over issues involving the FERC certificate and that the state court proceeding therefore amounted to a "collateral attack." *See* Motion for Summary Judgment and Brief in

even if the court of appeals' reading of the NGA was correct, and itself raises questions of considerable significance, warranting review by this Court.

It is a fundamental principle of our dual court system that federal courts may not enjoin state proceedings except under the narrowest of circumstances. The "general policy"—embodied in a number of separate, though related, doctrines—is that state proceedings " 'should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.' " *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146 (quoting *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970)). For example, when a state court has rendered a judgment, the provisions of 28 U.S.C. § 1738 specifically provide that federal courts should accord that judgment no less respect than the state courts themselves would give to it. That respect does not ebb and flow according to whether the federal court agrees with the state decision; revision of the judgment, if needed, is to be pursued "by way of appeal through the state-court system and certiorari from this Court." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986).[21]

Support Thereof at 16-19, filed by Williams Natural Gas Company, May 12, 1989. That the state court made no express mention of the question of the alleged "collateral attack" did not make the judgment any less an adjudication of it. *Grubb v. Public Utilities Comm'n of Ohio*, 281 U.S. 470, 477-78 (1929).

[21] In *Parsons Steel* the Court reversed a federal court of appeals' decision that, like the decision in this case, treated a prior state-court judgment as a nullity. There, as here, the federal court regarded the state-court judgment as invalid because it thought that the claim in that court should have been raised in prior federal litigation. This Court concluded that the action of the court of appeals had given "unwarrantedly short shrift to the important values of federalism and comity." 474 U.S. at 523.

Similar principles inform the so-called *Rooker* doctrine, which makes plain that federal courts are not to be used as substitutes for the state appellate courts in ruling upon the correctness of state-court holdings. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

In addition to these doctrines of finality, both Congress and this Court have placed strict limits on the authority of federal courts to enjoin ongoing state proceedings. "The Anti-Injunction Act [28 U.S.C. § 2283] generally prohibits the federal courts from interfering with proceedings in the state courts." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 145. As this Court has noted, "[b]y generally barring such intervention, the Act forestalls 'the inevitable friction between the state and federal courts that ensues from injunction of state judicial proceedings by a federal court.'" *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146 (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion)). Likewise, this Court has recognized that principles of federalism and comity may counsel against the use of injunctive power by federal courts. *Younger v. Harris*, 401 U.S. 37 (1971); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

The court of appeals below provided no adequate explanation for its decision to disregard these important checks upon lower federal-court interference with state courts. The court made no mention at all of Section 1738 or of Section 2283 or of *Younger*, and its treatment of *Rooker* largely depends on the idea that *Rooker* is inapplicable so long as the federal court finds a lack of jurisdiction in the state court. As a reading of *Rooker*, this idea is quite wrong. Whatever may be the case when a state court has not addressed the issue of its own juris-

diction, it is directly contrary to the principles reflected in *Rooker* for a federal court to set aside a state judgment for lack of jurisdiction when the state court has already ruled upon that question. There is no reason to suppose that state courts are especially prone to ignore governing federal law on matters of jurisdiction, and any such tendency—like any other refusal to apply federal law—can be reviewed by this Court after direct appeal through the state courts.

This Court, in fact, has frequently acknowledged that doctrines of finality are applicable to determinations about jurisdiction. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). As the Court said in *Insurance Corp. of Ireland*, "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack on an adverse judgment." 456 U.S. at 702 n.9. To the contrary, "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ibid.* A federal court thus is not free to set aside state judgments whenever it believes that the state court erroneously assumed jurisdiction over the case. The court of appeals below did just that.

The injunction required by the court of appeals also cannot be justified on the ground that the state court action involves issues of federal preemption. Discussing the provisions of the Anti-Injunction Act, 28 U.S.C. § 2283, this Court has stated that a federal court may not "enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398

U.S. 281, 294 (1970). *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. 2506, 2516 (1989). Indeed, because issues of preemption often follow upon (and can be avoided by) resolution of state-law issues, it would be anomalous to place a special disability upon state courts in this area. *See* note 15, *supra*.

In short, the court of appeals' decision to block enforcement of the Oklahoma judgment on grounds already rejected by the state court—and to short-circuit the normal process of appeal through the state courts to this Court—violated the principles designed to maintain the proper balance between federal and state judicial power. This Court should grant the petition to correct that ruling.[22]

Review is warranted for another reason as well. Although we see no reason why this case should present an exception to the various doctrines limiting lower federal court interference with state courts, we recognize that certain questions about the limits of these doctrines have not been definitively and unambiguously resolved by this Court. In particular, fifty years ago, this Court indicated that, where Congress has conferred exclusive jurisdiction on the federal courts, it was permissible to treat certain state-court judgments as void. *See Kalb v. Feuerstein*, 308 U.S. 433 (1940). The present scope and weight of that authority are not clear. As the Court pointed out in a later case, *Durfee v. Duke*, 375 U.S. 106 (1963), the state courts in *Kalb* had not actually ruled upon the issue of their jurisdiction—whereas, in the present case, the state court expressly did so—but *Kalb*

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[22] Permitting the Tenth Circuit decision to stand would effectively foreclose any review of the merits of the state-law and federal preemption issues presented in state court. Because the state trial court's order is to be federally enjoined, any further proceedings in the Oklahoma Supreme Court would be pointless, and Williams might well dismiss its appeal in that court.

has never been explicitly limited to that situation, where no collateral relitigation of issues actually decided would occur. Moreover, the Court has addressed, but not finally settled, the extent to which *Younger* principles apply to civil cases involving purely private parties. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. at 2517-18; *id.* at 2520-21 (Brennan, J., concurring); *id.* at 2521 (Rehnquist, C.J., concurring and concurring in judgment).

These are important questions involving the delicate balance between state and federal judicial authority. If there is to be a new exception to rules limiting interference with state-court judgments—one that involves the second-guessing of decisions by state courts regarding their own jurisdiction—that exception should be announced by this Court; if there is not to be such an exception, then the action taken by the court below should not be allowed to stand uncorrected. In either event, further review by this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.[23]

Respectfully submitted,

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February 12, 1990

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[23] The issues in this case are closely related to those presented in *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. 89-911, which involves the question of the respect that FERC and a federal reviewing court under Section 19 of the NGA must give to a state court judgment on NGA preemption. If the Court grants the petition in that case, the present petition should be granted as well, because this case involves the additional question of the propriety of the injunction against the state court order and because the Section 19 issues would be better understood if the Court had before it two different settings in which those issues arise. At a minimum, the present petition should be held pending final disposition of *Consolidated*. And even if the *Consolidated* petition is denied, the present petition should be granted, because this case raises a greater threat to the proper respect due state courts in our federal system and creates substantial uncertainty among litigants about what issues must be raised before FERC.

APPENDICES

APPENDIX TABLE OF CONTENTS

		Page
Appendix A:	Opinion of the United States Court of Appeals for the Tenth Circuit	1a
Appendix B:	Orders of the State Court	22a
	—Order Granting Summary Judgment to Oklahoma Natural Gas Company on State Franchise Issue (Feb. 16, 1989)	22a
	—Declaratory Judgment (May 19, 1989)	26a
Appendix C:	Orders of the United States District Court for the Western District of Oklahoma	31a
	—Order Setting Hearing (April 13, 1989)	31a
	—Order Granting Immediate Possession of Rights-of-Way (April 18, 1989)	33a
	—Order Allowing Construction of Pipeline and Allowing State Court to Decide Preemption Issue (May 1, 1989)	36a
	—Order Denying Williams' Request to Operate Pipeline (May 30, 1989)	39a
Appendix D:	Orders of the Federal Energy Regulatory Commission	45a
	—Order Granting Certificate of Public Convenience and Necessity (Feb. 16, 1989)	45a
	—Order Denying Rehearing (May 31, 1989)	62a
Appendix E:	Orders of the United States Court of Appeals for the Tenth Circuit	75a
	—Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (Dec. 27, 1989)	75a
	—Correction Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (Jan. 5, 1990)	77a

TABLE OF CONTENTS—Continued

Page

—Order Staying Mandate (Jan. 12, 1990) 79a

Appendix F: Pleadings in the State Action 81a

—Petition of Oklahoma Natural Gas for Declaratory Judgment (filed Oct. 18, 1988) 81a

—Amended Answer of Williams Natural Gas Company (filed Dec. 6, 1988) 87a

Appendix G: Complaint of Williams in the United States District Court for the Western District of Oklahoma (filed March 28, 1989) 93a

Appendix H: Pertinent Provisions of the Natural Gas Act of 1938 ..... 100a

Appendix I: Other Pertinent Statutory and Constitutional Provisions 108a

—Full Faith and Credit Act, 28 U.S.C. § 1738 ..... 108a

—Anti-Injunction Act, 28 U.S.C. § 2283 ..... 108a

—Oklahoma Declaratory Judgment Act, 12 O.S. 1981, § 1651 ..... 109a

—Oklahoma Constitutional Franchise Provision, Okla. Const., art. 18, §§ 5(a), 7 ..... 109a

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-6209, 89-6227 and 89-6228
(CIV-89-519)
(W.D. Okla.)

WILLIAMS NATURAL GAS COMPANY, a Utah Corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma Corporation,
and POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiffs-Intervenors-Appellants,

v.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
and OKLAHOMA NATURAL GAS COMPANY,
a Delaware Corporation,
Defendants-Appellees.

[Filed Nov. 22, 1989]

Douglas E. Nordlinger of Skadden, Arps, Slate, Meagher & Flom, Washington, D.C. (J. Clayton La Grone, William R. Burkett & Steven L. Tolson of Hall, Estill, Hardwick, Gable, Golden & Nelson, Oklahoma City, Oklahoma; John S.L. Katz and John N. Estes of Skadden, Arps, Slate, Meager & Flom, Washington, D.C.; and S. Paul Hammons of Andrews, Davis, Legg, Bixler, Milsten &

Price, P.C., Oklahoma City, Oklahoma, on the briefs), for Plaintiff-Appellant and Plaintiffs-Intervenors-Appellants.

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Catherine C. Cook, General Counsel, Jerome M. Feit, Solicitor, and Katherine Waldbauer filed an Amicus Curiae brief for the Federal Energy Regulatory Commission.

Before McKAY, LOGAN, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

This appeal arises from the United States District Court for the Western District of Oklahoma, where that court denied appellant's motion to construe federal condemnation rights under the Natural Gas Act and to disregard and stay the order of the Oklahoma County District Court. The order of the federal district court, issued May 30, 1989, effectively denied appellants full enforcement of a Federal Energy Regulatory Commission ("FERC" or "Commission") certificate authorizing appellants to construct and operate a natural gas pipeline to service the PowerSmith Cogeneration Project's ("PowerSmith") cogeneration facility in Oklahoma City.[1]

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[1] PowerSmith Cogeneration Project, Limited Partnership, is a developer of cogeneration projects (facilities that burn fuel for the production of electric and thermal energy, such as steam). PowerSmith is now completing construction of a 108-megawatt, $80

We find the state court lacked jurisdiction to entertain a collateral challenge to the FERC certificate and, accordingly, we REVERSE.

I. Statement of the Case

The dispute has its genesis in the competition between appellee Williams Natural Gas Company ("Williams") and appellant Oklahoma Natural Gas Company ("ONG") for the contract to transport natural gas to the PowerSmith facility—a competition eventually won by Williams. In order to service PowerSmith, Williams needed to construct a twelve-mile extension of an existing interstate pipeline to PowerSmith. As an interstate "natural-gas company" under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717z (1988), Williams could not construct or operate the extension without applying to and receiving from FERC, pursuant to § 7(c) of the NGA, 15 U.S.C. § 717f(c), an authorizing certificate of public convenience and necessity.

ONG is the local distribution company with a city franchise to sell, transport and distribute natural gas to the general public in Oklahoma City. The city franchise grants ONG the right to construct, operate and maintain facilities in the public streets and other public ways for its distribution purposes. Williams' pipeline construction would also require access to and use of the streets of Oklahoma City. Therefore, on October 18, 1988, before Williams was able to complete its application to FERC, ONG commenced the race to the courthouse and filed a declaratory judgment action in Oklahoma County District Court, asserting its franchise gives it the right to use City streets and to the exclusion of a nonfranchised transporter. Williams and PowerSmith answered on November 10, 1988, asserting as a defense that the NGA,

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million cogeneration facility in Oklahoma City, on the grounds of a tire manufacturing plant owned by Firestone Tire & Rubber Company. The facility is designed to burn natural gas.

15 U.S.C. §§ 717-717z, preempts Oklahoma franchise law and therefore Williams was not required to obtain a franchise.

On October 28, 1988, ten days after ONG had filed its action in state court, Williams applied to FERC for the certificate of public convenience and necessity authorizing the construction and operation of the PowerSmith pipeline. ONG responded by protesting and intervening in opposition to Williams' application. In its intervention, ONG contested FERC's jurisdiction to regulate the proposed pipeline, questioned the sufficiency and substance of Williams' application and urged the Commission to explore alternative proposals.

More specifically, in its challenge to FERC's jurisdiction, ONG argued that the facilities proposed by Williams should be subject to local rather than federal regulation: "[T]he proposal, notwithstanding that it is cast as an application to expand service by an interstate pipeline, in fact relates to service in the nature of distribution or intrastate transportation," and "[a]s such, the facilities are local in nature and should be subject not to FERC jurisdiction, but rather to local regulation . . . ." Indeed, ONG argued, "[t]his case cries out for local, not federal, regulation."

On February 16, 1989, after denying ONG's request for a hearing in the matter, FERC granted Williams a certificate authorizing and directing Williams to construct and operate the PowerSmith pipeline. As to ONG's jurisdictional contentions, FERC found that the facilities proposed by Williams were within its jurisdiction and therefore subject to subsections (c) and (e) of § 7 of the NGA, 15 U.S.C. § 717f(c), (e). *Williams Natural Gas Co.*, 46 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,160 (1989). In support of this finding FERC determined that the facilities proposed bore little resemblance to a local distribution system. Further, incorporating language from its previous decision in *Panhandle*

Eastern Pipeline Co., 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,076 (1988), the Commission stated,

> "[I]rrespective of any local effects resulting from the by-pass, we believe that the transportation service at issue here essentially concerns Federal interests, that is, those embodied in developing interstate transportation policy that provides consumers with a variety of supply options by promoting a competitively priced spot market for natural gas."

Williams, 46 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,160 at 61,559 (quoting *Panhandle*).

On March 1, 1989, ONG filed with FERC a Request for Rehearing and Motion to Stay the FERC Order. FERC denied ONG's motion to stay on March 31, 1989, and denied ONG's request for rehearing on May 31, 1989. 47 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,308, 1989 FERC LEXIS 1363.[2]

Also on February 16, 1989, the same day FERC issued its order, the Oklahoma state court ruled in ONG's declaratory judgment action. The court held, under Oklahoma law, ONG's franchise insulates it from competition in Oklahoma City from nonfranchisees. The state court specifically reserved for a later time (pending study of further briefs to be submitted by the parties) the issue whether federal law preempts the requirements of Oklahoma law and, thus, whether the authority of a FERC certificate negates the Oklahoma franchise requirement.

On March 28, approximately six weeks after the orders of FERC and the state court had been issued, Williams brought an action to enforce the FERC certificate in the United States District Court for the Western District of

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[2] ONG subsequently filed a petition for review of the FERC orders with the United States Court of Appeals for the District of Columbia Circuit. *Oklahoma Natural Gas Co. v. FERC*, No. 89-1376 (D.C. Cir. filed June 12, 1989). Williams and PowerSmith have moved to transfer that petition for review to this Court.

Oklahoma pursuant to § 7(h) of the NGA, 15 U.S.C. § 717f(h). Specifically, Williams sought to condemn rights of way across city streets to construct and operate the PowerSmith pipeline under the FERC certificate and to quiet Williams' title to those rights of way as against ONG's franchise rights. Thereafter, by order of April 18, the federal district court authorized Williams to condemn city rights of way "for the purpose of laying a pipeline" pursuant to the FERC certificate. However, the court's order made no mention of Williams' ability to "operate" the pipeline.

In response, on April 28, ONG sought and obtained from the state district court a temporary restraining order ("TRO") enjoining Williams from constructing the pipeline across city streets. On May 1, the federal district court responded by enjoining enforcement of the state TRO, finding that it interfered with its jurisdiction and order permitting the construction. However, in issuing this order, the federal court declined to enjoin the state court's consideration of the preemption issue and abstained from ruling on the question of federal preemption because that issue had been first presented to the state court.

On May 11, Williams and PowerSmith requested the federal district court to reconsider its decision to abstain and again requested the court to enjoin the state court's consideration of the preemption question. However, on May 19, while this motion to reconsider was pending, the state court decided the preemption issue before it, holding the FERC certificate did not preempt the state franchise requirement. The state court therefore permanently enjoined the construction and operation of the pipeline, notwithstanding the authority of the FERC certificate.[3]

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[3] FERC, in its decision of May 31 declining ONG's request for a rehearing, expressed its complete disapproval of the state district court's decision and reaffirmed its conclusion that Williams' pro-

After the state court granted its injunction, the federal district court issued its final order on May 22, granting the condemnation rights to Williams "for the purpose of the construction, maintenance and operation" of the pipeline. The court then held a hearing on May 24 to consider a further request by Williams and PowerSmith to construe federal condemnation rights under the NGA and to stay the enforcement of the state court order to the extent it interfered with the May 22 condemnation order. Williams and PowerSmith argued the state court injunction was an impermissible infringement upon the federal district court's exclusive condemnation jurisdiction under § 7(h) to enforce the FERC certificate. After further briefing by the parties, the federal court, in an order issued May 30, refused to grant further injunctive relief and declined to alter its previous decision to abstain. The court concluded that the intervening state court decision on preemption had effectively deprived the federal courts of authority to reverse or reconsider the issue. The court believed itself bound by the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923), to defer to the state court's decision, with appellate relief available to Williams only through the Oklahoma Supreme Court.[4] However, the court certified the matter for immediate review to this court under 28 U.S.C. § 1292(b).[5]

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posed service to PowerSmith would benefit the public interest. *Williams Natural Gas Co.*, 47 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,308; 1989 FERC LEXIS 1363.

[4] An appeal to the Oklahoma Supreme Court is pending from the decision of the District Court for Oklahoma County, Oklahoma, captioned *Smith Cogeneration, Inc. v. Oklahoma Natural Gas Co.*, No. 73649 (Okla. filed July 18, 1989).

[5] Prior to oral argument, the appellants petitioned this court for emergency injunctive relief. We denied the relief requested in our order of July 24, 1989. Apparently in response to statements of the court at oral argument, appellees submitted a notice to this court of changed circumstances regarding appellants' emergency petition. We have not considered this material as it is in violation of Fed. R. Civ. P. 28(c) and 10th Cir. Rule 31.2.1.

II. *Analysis*

The issues presented to this court in the parties' briefs focus primarily on the merits of the federal district court's order of May 30, 1989. Thus framed, we are urged to decide whether the district court, relying upon the *Rooker* doctrine, erred by abstaining from deciding the question of federal preemption and by refusing to enjoin enforcement of the state court decision. Additionally, the appellants urge this court to decide the underlying substantive issues of whether the Oklahoma franchise requirement is preempted by the NGA and/or invalid under the commerce clause. However, we cannot even attempt to address these issues until we air certain core jurisdictional issues that lurk beneath the surface of the controversy.

In an introduction to their brief, appellants present a three-part analysis of what they view to be the exclusive jurisdiction of FERC to handle the issues of this case. First, appellants submit FERC is empowered with the exclusive authority to regulate the interstate transportation of natural gas and, accordingly, the Power-Smith pipeline. Thus, they argue, the state proceeding was barred from the outset. Secondly, they argue the provisions of NGA § 19(b), 15 U.S.C. § 717r(b) (1988), create the exclusive avenue for judicial review of FERC orders. Third, and as a corollary to the second, appellants contend the validity and conditions of a FERC certificate cannot be collaterally attacked in federal district court during an eminent domain proceeding pursuant to NGA § 7(h).

We choose not to address the appellant's first jurisdictional point for two reasons. First, so expansive an argument virtually assumes the conclusion of the underlying, substantive federal preemption question.[6] Second,

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[6] We note, without comment, the recent decision of the United States Court of Appeals for the Sixth Circuit in *Michigan Con-*

and more importantly, we view this argument to be unnecessary to determine the proper jurisdictional course here, where FERC issued its certification order before the state court entertained issues of federal jurisdiction or preemption. We proceed to the second part of appellants' jurisdictional analysis.[7]

A. The Exclusive Judicial Review Provisions of NGA § 19.

It is well established that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Thus, we begin our jurisdictional analysis with the statutorily provided means for contesting a FERC certificate issued pursuant to § 7(c) of the NGA. First, § 19(a) of the NGA, 15 U.S.C. § 717r(a), provides in pertinent part:

> (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing

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solidated Gas Co. v. Panhandle Eastern Pipe Line Co., 887 F.2d 1295 (6th Cir. 1989), which held that Michigan's authority to regulate the interstate transportation of natural gas in the "bypass" of a local distribution company is preempted by the Natural Gas Act. As explained herein, we do not reach the merits of the preemption issue.

[7] Issues of jurisdiction are questions of law requiring *de novo* review. *Walden v. Bartlett*, 840 F.2d 771, 772-73 (10th Cir. 1988).

> or to abrogate or modify its order without further hearing.

Consistent with these requirements, ONG timely filed on March 1 its request for a rehearing before FERC. After that request was denied by FERC on May 31, ONG further pressed its appeal to the Court of Appeals for the District of Columbia Circuit, in accordance with § 19 (b) of the NGA, 15 U.S.C. § 717r(b):

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . *Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.* No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(Emphasis added.)

As the statutory language plainly states, the special judicial review provisions of § 19 are exclusive. *McCul-*

loch Interstate Gas Corp. v. Federal Power Comm'n, 536 F.2d 910, 913 (10th Cir. 1976) (citing *Whitney Nat'l Bank v. Bank of New Orleans Bank & Trust Co.*, 379 U.S. 411, 420, 422 (1964)). The provisions of § 19 are nearly identical to the judicial review provisions of various other federal regulatory programs. In each case, these provisions have been interpreted to establish an exclusive scheme of review. *See, e.g., City of Tacoma*, 357 U.S. at 334-36 (interpreting the provisions of Federal Power Act ("FPA"), § 313(b), 16 U.S.C. § 8251 (b)); *United States by Donovan v. Howard Electric Co.*, 798 F.2d 392, 395 (10th Cir. 1986) (Occupational Safety and Health Act, 29 U.S.C. § 660(a)); *United States v. McBride*, 788 F.2d 1429, 1432 (10th Cir. 1986) (Federal Aviation Act ("FAA"), 49 U.S.C. § 1486(a), (d)); *County of Halifax, Va. v. Lever*, 718 F.2d 649, 652 (4th Cir. 1983) (FPA, § 313(b), 16 U.S.C. § 8251(b)); *City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979) (FAA, 49 U.S.C. § 1486(a), (d)).

The watershed case in this regard was *City of Tacoma*. In *City of Tacoma*, the City sought to obtain a license from the Federal Power Commission ("FPC") to construct a power project on the Cowlitz River in the state of Washington. One of the project's dams would result in the total inundation of a state-owned fish hatchery. The State intervened and participated in the hearings before the Commission and alleged, *inter alia*, that the project would violate a state law, Wash. Rev. Code § 75.20.010, which required the State's permission to construct any dam exceeding certain size specifications. Shortly thereafter the Commission granted the license. The State then petitioned for a rehearing, which was denied.

Pursuant to § 313(b) of the FPA, the State petitioned for a review of the Commission's order before the Court of Appeals for the Ninth Circuit, where the FPC's decision was affirmed. The Supreme Court denied certiorari. In a subsequent state proceeding, the City sought

a judgment declaring valid a large issue of revenue bonds to finance the construction of the project. The State answered and filed a cross-complaint alleging that the project would interfere with the navigation of the Cowlitz River, in violation of state law Wash. Rev. Code § 80.40.010. The state trial court entered judgment in favor of the State and enjoined the City from constructing the project. The Supreme Court of Washington affirmed. The United States Supreme Court reversed, finding the objections raised in state court to the FPC license to be "impermissible collateral attacks" under § 313(b):

> [Section 313(b) of the Federal Power Act] is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent. . . . It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.

357 U.S. at 335-36.

Judicial review under § 19(b) is exclusive in the courts of appeals once the FERC certificate issues. *Cf. Whitney Nat'l Bank*, 379 U.S. at 421-22. In *Whitney Nat'l Bank*, the Court applied *City of Tacoma*, to hold that, under the Bank Holding Company Act of 1956, challengers to a determination of the Federal Reserve Board must first bring their attack before the Board, subject only to review by the court of appeals. This review structure parallels that of § 19, where parties must first appeal to FERC.[8]

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[8] Linguistically, the language of § 19(b) providing for exclusive jurisdiction "upon the filing of such petition" with the court of appeals might permit a separate action if a federal or state court reviews an agency order before a petition for review can be filed, or if a petition is never filed. However, to allow parties to circumvent the scheme of judicial review under § 19 simply by choosing not to file a petition for review with FERC or the court of appeals would be to allow precisely the type of collateral challenge that *City*

Thus, a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding. *McCulloch*, 536 F.2d at 913 (quoted in *Howard Electric*, 798 F.2d at 394). Moreover, the prohibition on collateral attacks applies whether the collateral action is brought in state court, *e.g.*, *City of Tacoma*, or federal court, *e.g.*, *McCulloch*. Our interpretation of § 19 is entirely consistent with § 10(b) of the Administrative Procedure Act, 5 U.S.C. § 703 (1976), which provides "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action. . . ." *Cf. City of Rochester v. Bond*, 603 F.2d at 935.

Furthermore, we see nothing in the substantive character of ONG's challenges to the FERC order that would exempt those arguments from the statutory appellate scheme. Here again, *City of Tacoma* is helpful. There the Supreme Court read § 313(b) of the FPA to "necessarily preclude[] *de novo* litigation between the parties of *all issues inhering in the controversy*." 357 U.S. at 336 (emphasis added). We would be hard pressed to formulate a doctrine with a more expansive scope.

Additionally, we fail to find provision in § 19 of the NGA for the bifurcation of judicial review along sub-

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of Tacoma condemned and would defeat the "exclusive" review provisions of § 19(b). *City of Rochester v. Bond*, 603 F.2d at 935 (collateral challenge violated an exclusive statutory scheme of judicial review even where the challenger to an order of the Federal Aviation Administration was not a party to the administrative proceedings, had no actual notice of such proceedings, and thus failed to timely file a petition for review in the court of appeals). *See also, McBride*, 788 F.2d at 1432-33 (collateral action impermissible where the challenger to an agency order failed to file a timely appeal under the applicable statute); *County of Halifax, Va. v. Lever*, 718 F.2d at 651 (collateral action impermissible where the challenger to a FERC permit deliberately declined to press for relief through the available statutory means in favor of a collateral action in federal district court).

stantive lines. This is not surprising, however, given that such a procedure would negate most of the benefits attending the "exclusive" scheme of review. In *City of Rochester v. Bond*, the D.C. Circuit addressed this same issue when it confronted a collateral challenge to a determination of the Federal Aviation Administration based on another federal statute, the National Environmental Policy Act ("NEPA"):

> First, we disagree that the district court may exercise concurrent jurisdiction merely because a violation of NEPA is alleged. The allegation may be raised directly in the courts of appeals; and insofar as it may affect the lawfulness of a directly appealable order we think it must be. . . .
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> The rationale for statutory review is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts. The choice of forum is, as we have said, for Congress and we cannot imagine that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive infirmity alleged. The policy behind having a special review procedure in the first place similarly disfavors bifurcating jurisdiction over various substantive grounds between district courts and the court of appeals. The likelihood of duplication and inconsistency would exist in either case.

603 F.2d at 936 (footnotes omitted).

Here, however characterized, the state court's consideration of the preemption issue ultimately challenges FERC's determination of its own jurisdiction. Jurisdiction is not an issue with which FERC is unfamiliar or which it is incapable of addressing on appeal. In fact, as we have previously held, the "mode of challenging an agency's jurisdictional decision is by direct attack." *Howard Electric*, 798 F.2d at 394, and *McCulloch*, 536

F.2d at 913 (both citing *Callanan Road Co. v. United States*, 345 U.S. 507, 512 (1953)).

As we have already chronicled, ONG contested the jurisdiction of FERC in its original intervention and protest before the Commission. ONG's jurisdictional arguments were laced with the theme of conflict between state and federal regulation. (However, whether intentionally or unintentionally, ONG never expressly advanced those arguments in terms of "preemption.") FERC responded in kind by discussing, in its order of February 19, 1989, its view as to why the pipeline was essentially a federal concern and subject to its jurisdiction. *Williams Natural Gas Co.*, 46 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,160, at 61,559 (1989).

ONG again raised the preemption argument in everything but name in its request for rehearing before FERC. In its specification of errors, ONG contended the Commission erred in failing to find that the PowerSmith facilities, and the activities thereon, were matters of local interest which are not subject to FERC jurisdiction, but rather are subject to the jurisdiction of the Oklahoma Corporation Commission. Although this argument expressly hinged on the language of § 1(b) of the NGA, 15 U.S.C. § 717(b),[9] ONG argued more broadly:

> When enacting the NGA, . . . Congress created a dual state-federal regulatory scheme over natural gas. The manifest purpose in enacting the NGA was to close regulatory gaps by complementing and

[9] Section 1(b) of the NGA, 15 U.S.C. § 717(b) provides:

> (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

> strengthening state regulation. *See Panhandle Eastern Pipe Line Co. v. Indiana Public Service Comm.*, 332 U.S. 507 (1947). Moreover, "Congress did not desire comprehensive federal regulation; much authority was reserved for the States. . . ." *Transcontinental Gas Pipe Line Corp. v. Federal Power Comm.*, 365 U.S. 1, 19 (1961).
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> . . . Thus, while Congress made sales for resale and the transportation of natural gas in interstate commerce subject to federal regulation, Congress expressly withheld from federal regulatory jurisdiction all other transportation of natural gas.

In denying the rehearing request, FERC once more expressed its view on the subject of federal jurisdiction, noting that it completely disapproved of the conflicting state opinion. *Williams Natural Gas Co.*, 47 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,308, at n.5 (1989), 1989 FERC LEXIS 1363.

However, our conclusion does not depend on a finding that ONG implicitly or expressly submitted the preemption issue to FERC. Instead, it is sufficient to hold that the issue could have and should have been raised before FERC. Again, the analysis of the Supreme Court in *City of Tacoma* is instructive:

> We think these recitals show that the very issue upon which the respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment. But even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its

> action to review and reverse the Commission's order was pending in that court. . . .

357 U.S. at 339.[10]

We need not reach the question of whether the various arguments by ONG in FERC proceedings were sufficient, for purposes of § 19(b), to permit argument on the preemption issue before the D.C. Circuit. Nor do we feel compelled to explore whether ONG has, in fact, submitted the issue to that court. We hold only that ONG could have and should have raised the preemption issue before FERC originally or upon its motion for rehearing. The issue may be advanced by direct attack, pursuant to the appellate structure of § 19(b), or not at all. *City of Tacoma*, 357 U.S. at 336. Accordingly, because ONG filed its petition for review under § 19(b) with the United States Court of Appeals for the D.C. Circuit, this court cannot reach the merits of the preemption issue.

The structure Congress has provided to litigate and resolve disputes arising under the Natural Gas Act should not be lightly disregarded. In the instant case it is apparent that ONG filed its action in state court as a "preemptive strike." It makes little sense for the state court action to have been filed unless ONG at the time of filing knew or had reason to believe that Williams would be awarded the requisite certificate of public convenience and necessity. The roadway to resolution of the dispute between Williams and ONG has been both charted and mandated by Congress. It makes no sense to permit the parties to chart their own route and thus allow piecemeal and unending litigation to ensue.

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[10] Although the *City of Tacoma* court did not find it necessary to hinge its conclusion upon an extra-statutory doctrine such as res judicata, estoppel, collateral estoppel, or waiver, 357 U.S. at 336-37, in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966), the court held that res judicata principles may apply to an administrative agency's adjudication.

We hold that the proceedings in the state court that resulted in the order enjoining Williams' exercise of rights granted in the FERC certificate constituted an impermissible collateral attack on a FERC order in contravention of § 19 of the NGA. Thus, the federal district court erred in refusing to enjoin the enforcement of the state court injunction. We also hold that a collateral challenge to the FERC order could not be entertained by the federal district court. We agree with the appellants that the eminent domain authority granted the district courts under § 7(h) of the NGA, 15 U.S.C. § 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function under the statute is not appellate but, rather, to provide for enforcement. *See McBride*, 788 F.2d at 1432 (addressing an enforcement action under the FAA, 49 U.S.C. § 1487).

B. *The Rooker Doctrine.*

Finally, we do not view our conclusion that the state court lacks appellate jurisdiction over the FERC determination to be at odds with the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). Instead, we consider it *Rooker*'s necessary complement.

In *Rooker*, the Supreme Court held that the lower federal courts do not have appellate jurisdiction to review state court decisions. Such jurisdiction is vested only in the state appellate courts and in the Supreme Court of the United States. 263 U.S. at 416. The rule applies even when the state court decision is challenged as unconstitutional, *id.*; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986), or when the state court erroneously decides a federal question, *see Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

As the Supreme Court articulated in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286, (1970), the *Rooker* doctrine is a necessity in a nation with two separate legal systems:

> [T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," *Oklahoma Packing Co. v. Gas Co.*, 309 U.S. 4, 9, (1940), it was necessary to work out lines of demarcation between the two systems.

However, the *Rooker* "line of demarcation" and the principles of comity it represents, cannot be observed unilaterally if it is to achieve its desired effects. Just as the federal courts lack jurisdiction to review the decisions of the state courts, so also must state courts defer to the federal appellate process mandated by Congress.[11] What is sauce for the goose is also sauce for the gander. Otherwise, the "needless friction" that *Rooker* seeks to prevent would be commonplace.

Here, despite the existence of the prior FERC determination and the exclusive review provisions of § 19, the state court proceeded to decide a question that could have and should have been raised before FERC and, based on its determination of that issue, enjoined enforcement of the FERC order. We do not dispute the assertion of the

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[11] This requirement is akin to the reciprocal nature of res judicata principles between the state and federal courts.

> It would be unthinkable to suggest that state courts should be free to disregard the judgment of federal courts, given the basic requirement[s] that . . . federal courts must honor state court judgments. . . . The requirement that federal court judgments command at least the central core of res judicata effects in state courts is "indispensable to federalism."

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4468, at 648-49 (1981) (footnotes omitted).

appellees that the Oklahoma courts have jurisdiction to decide questions of federal preemption. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, ——, 108 S. Ct. 1684, 1691 (1988). However, that issue was not advanced in a vacuum. Preemption was considered by the state court only after the FERC certificate issued and after the exclusive judicial review provisions of § 19 attached.[12] Consequently, the state action crosses the *Rooker* boundary, just as a federal court exceeds its jurisdiction when it disregards the exclusivity of a state's ongoing appellate process. This court will not misuse *Rooker* to shield a state court injunction that runs afoul of the very principles of comity that lay at *Rooker*'s base.[13]

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[12] Appellees also assert that *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), is dispositive here. We obviously disagree. The state court proceeding there was not a collateral challenge to a FERC order and thus was not violative of § 19. Instead, the state court action was brought simply to enforce the terms of a contract.

A customer of Pan American sought to recover certain overpayments made to Pan American after an order of the Kansas Corporation Commission was declared invalid. By amended contract, refund of the overpayments was conditioned on such declaration. Earlier, Pan American had filed its rate schedules with the FPC, along with the basic contracts underlying those rates. Therefore, Pan American argued the rate could only be changed pursuant to § 19 of the NGA. However, the actions of the FPC did not serve to abrogate the basic contract between the parties and the Court held that the state court was not deprived by the provisions of § 19 or § 22 of jurisdiction to decide questions of state contract law. 366 U.S. at 662-63.

[13] As counsel for appellees expressed at oral argument, appellees would have us apply *Rooker* to bar the D.C. Circuit from reaching the preemption issue during its review of FERC certificate. This would be akin to allowing a federal district court's review of a state decision to thereafter deprive state appellate courts of jurisdiction to hear the same issue. Such a result is impermissible under *Rooker*.

Thus, it is our view that the deference afforded the decisions of state courts under *Rooker* is not warranted where, as here, a state court has erroneously taken appellate jurisdiction over issues that have been previously decided by a federal agency, or when review of those issues could have and should have been sought pursuant to the federal statutory scheme.

C. *Conclusion*

We therefore hold, upon the issuance of a FERC certificate pursuant to § 7(c) of the NGA, 15 U.S.C. § 717f (c), the provisions of § 19(a)-(b) provided the exclusive course for judicial review of the FERC decision and barred collateral attack in either the state or federal district courts as to those issues that could have been raised in the FERC proceeding or appeal. The appellees have chosen the wrong roads, state and federal, for challenging FERC's order. They are left with their appeal before the Court of Appeals for the District of Columbia and, to the extent they have complied with the provisions of § 19(b), will be able there to present all of their challenges to the validity of the FERC certificate.

Accordingly, the judgment of the district court is REVERSED and the cause REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY, a division of ONEOK INC., a Delaware corporation,
Plaintiff,

v.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, a Delaware limited partnership; WILLIAMS NATURAL GAS COMPANY, a Deleware corporation; and LADD PETROLEUM CORPORATION, a Delaware corporation,
Defendants.

[Entered Feb. 16, 1989; Filed May 1, 1989]

ORDER GRANTING MOTION OF PLAINTIFF, OKLAHOMA NATURAL GAS COMPANY, FOR PARTIAL SUMMARY JUDGMENT AND OVERRULING MOTIONS OF DEFENDANTS FOR PARTIAL SUMMARY JUDGMENT

Now on this 16th day of February, 1989, this matter comes on for hearing on the Motion for Summary Judgment of Plaintiff, Oklahoma Natural Gas Company ("ONG"), the Motion for Summary Judgment of Defendants, Smith Cogeneration, Inc. and PowerSmith Cogeneration Project and the Motion for Summary Judgment of Defendants, Williams Natural Gas Company and

Ladd Petroleum Company. Plaintiff, ONG, appeared by and through its counsel, Curtis M. Long of Huffman Arrington Kihle Gaberino & Dunn and Thomas J. Enis of Fellers, Snider, Blankenship, Bailey & Tippens; defendants, Smith Cogeneration, Inc. and PowerSmith Cogeneration Project, appeared by and through its counsel, S. Paul Hammons of Andrews, Davis, Legg, Bixler, Milsten & Price; and defendants, Williams Natural Gas Company ("Williams"), and Ladd Petroleum Corporation, appeared by and through their counsel, J. Clayton LaGrone and William R. Burkett of Hall, Estill, Hardwick, Gable, Golden & Nelsen, P.C.

The Court has carefully examined and considered the motions and briefs of the parties, has studied the pertinent legal authorities and has been appraised of the following stipulations of counsel, made, in open court, at the commencement of the hearing:

As stipulated by the parties, the issues presently before the Court are ripe for decision under Rule 13 of the Rules of the District Courts of the State of Oklahoma; any issues of fact in dispute, such as the extent of the claimed loss of business set forth by ONG, are not material to a determination of the franchise issue currently before the Court; and the issues are submitted to the Court upon the briefs of the parties without oral argument.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Cross-Motions for Summary Judgment are properly before the Court for decision, that there are no disputed issues of fact material to the decision of the Court and that this Court has jurisdiction of the parties and of the subject matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of plaintiff, ONG, is granted and that the franchise of ONG grants it the right to construct, operate and maintain facilities in the public streets and other public ways for the purpose of transporting, distributing and selling nat-

ural gas to the inhabitants of Oklahoma City and such privilege includes the right to use and occupy the streets for such purpose exclusively without competition, such as that activity proposed by Williams, except from another franchise holder, and the Motions for Summary Judgment of defendants are denied.

The Court reserves its ruling on the issue of whether federal law preempts the requirements of Williams obtaining a franchise from the City of Oklahoma City pending study of further briefs to be submitted by the parties herein.

/s/ David M. Cook
DAVID M. COOK
District Judge

APPROVED AND AGREED:

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ONG-Order 1-A

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY,
a division of ONEOK Inc.,
a Delaware Corporation,
Plaintiff,

v.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, a Delaware corporation; WILLIAMS NATURAL GAS COMPANY, a Delaware corporation; and LADD PETROLEUM COMPANY, a Delaware corporation,
Defendants.

[Filed May 19, 1989]

DECLARATORY JUDGMENT

The facts in this case are undisputed. For many years Oklahoma Natural Gas Company (ONG) has been engaged in the business of distributing and selling natural gas to its Oklahoma City customers under a franchise. The current franchise was granted by the city voters on April 24, 1985. On October 18, 1988, ONG filed its petition herein asking judicial declaration of its franchise rights as against the named defendants.

Smith Cogeneration, Inc. and Powersmith Cogeneration Project (hereinafter collectively referred to as

Smith), executed a contract with Ladd Petroleum Company to purchase gas, which Ladd will deliver to Smith at a point outside Oklahoma City. Williams Natural Gas Company (Williams) has agreed to build a pipeline and deliver the gas to Smith's plant, located within the municipal limits of Oklahoma City. Williams, without obtaining a franchise from the voters of Oklahoma City, will use the public streets of Oklahoma City to provide this service to Smith.

Two questions of law are submitted for the Court's determination. Summarized, those questions are:

1. Is Williams required to obtain a franchise from the voters of Oklahoma City to use the public streets of the city in order to transport the natural gas to Smith?

2. Does the Natural Gas Act (NGA)[1] pre-empt state law?[2]

All parties stipulated that this Court should first address the franchise question, because a ruling adverse to ONG would render the pre-emption issue moot. The Court approved counsels' stipulation to bifurcate the issues. After submission of briefs on the franchise issue, this Court ruled that under the stipulated facts herein, Oklahoma law requires Williams to obtain a franchise from the voters of Oklahoma City.[3]

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[1] Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w.

[2] Okla. Const., Art. XVIII, § 5(a).

[3] Upon application of ONG, this Court also issued a temporary injunction against Williams, dated April 28, 1989, enjoining Williams from constructing a pipeline in the city of Oklahoma City pending determination of the pre-emption issue.

On October 28, 1988, (10 days after ONG filed its petition in this case), Williams applied to the Federal Energy Regulatory Commission (FERC) for a certificate of convenience and necessity. It thereby sought authority to construct and operate the pipeline here in dispute under § 7(c) of the NGA. FERC granted the Certificate

The pre-emption issue has been submitted to this Court on briefs. Oral argument was heard on May 18, 1989. This Court finds that it has jurisdiction of the parties and the subject matter of this dispute.[4]

Direct retail sale of natural gas is a matter of local concern because of adverse economic effects on local consumers resulting from impermissible or undesirable competition.[5] However, Williams does not propose to sell gas to Smith or any other consumer located within the geographical limits of Oklahoma City. It intends to *transport* the gas into the geographical limits of Oklahoma City for the sole purpose of delivery to Smith. This results in a "transportation bypass" of the local distribution company, ONG. Thus, the issue here is whether "transportation bypass" of ONG is a matter of exclusive federal jurisdiction or is of local concern subjecting such transaction to local regulatory authority. Research fails to disclose a case factually identical to the case before this Court.

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on February 16, 1989. Thereafter, on March 28, 1989, Williams filed a complaint in the United States District Court for the Western District of Oklahoma, styled *Williams Natural Gas Company v. The City of Oklahoma City and Oklahoma Natural Gas Company*, No. CIV-89-519-T, seeking to condemn city property for the purpose of constructing the pipeline and a determination that title to such condemned property be quieted and confirmed as against the rights of ONG. On May 1, 1989, U.S. District Judge Wayne Alley stayed this Court's temporary injunction, finding that this Court proceeding "is an interference" with the federal court's jurisdiction. In so doing, Judge Alley further stated: "The issue of pre-emption having been presented to the state court, this court will not proceed to decide that issue in advance of the state court decision on the issue if that be made within a reasonable time."

[4] *Chick Kam Choo v. Exxon Corp.*, —— U.S. ——, 108 S.Ct. 1684 (1988); *Cities Service Gas Company v. Oklahoma Tax Commission*, 60 Okla. B.J. 1129 (Okla. May 2, 1989).

[5] *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Ser. Comm'n.*, 341 U.S. 329, 71 S.Ct. 777 (1951).

This Court concludes that "transportation bypass" like "sale bypass" of ONG's exclusive right to the use of the public streets of Oklahoma City under its franchise constitutes competition with a franchised public utility, resulting in adverse economic effects on the local utility customers. "Transportation bypass" proposed by these defendants may have a more profound adverse effect on the price of gas that ONG's customers will be compelled to pay for their gas than a "Sale bypass" transaction.[6] Such a matter is of legitimate local concern, and the means chosen by the State of Oklahoma is plausibly related to that concern. The Oklahoma Constitutional requirement of a franchise does not have as its central purpose the regulation of matters Congress intended to regulate.[7]

Federal regulation of the natural gas industry was not intended to oust state jurisdiction over matters of essentially local concern such as found here—"transportation bypass" service to consumers located within the geographical limits of Oklahoma City without first obtaining a franchise from the voters of the city. This Court concludes that federal law does not pre-empt Oklahoma law under the facts presented in this case. Therefore, Williams does not have the right to use any of Oklahoma City's streets, alleys or other public rights-of-way for the purpose of laying pipelines and other equipment neces-

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[6] See Affidavit of James A. Metcalf, Jr. and his supporting calculations, Exhibit 1 to ONG's Amendment to its Brief in Support of its Motion for Summary Judgment on Pre-emption Issue, filed herein May 5, 1989.

[7] *Pacific Gas & Elec. Co. v. State Energy Resources Comm'n.*, 461 U.S. 190, 103 S.Ct. 1713 (1983); *Northwest Central Pipeline Co. v. State Corp. Comm'n.*, —— U.S. ——, 109 S.Ct. 1262 (1989); *California v. ARC America Corp.*, —— U.S. ——, 109 S.Ct. 1661, 57 U.S.L.W. 4425 (April 18, 1989); See also: "Regulation of Gas Utility Bypass: A Case for Concurrent Jurisdiction," by Herbert J. Martin and Steven J. Gorosh, Exhibit "B" to plaintiff ONG's Brief in Support of Motion For Summary Judgment covering the Pre-emption Issue.

sary for the transmission of natural gas to Powersmith's Firestone Project without first obtaining a franchise from Oklahoma City.[8]

IT IS THEREFORE ORDERED that ONG's motion for summary judgment is sustained and defendants' motions for summary judgment are denied.

Pursuant to 12 O.S. 1981, § 1655, IT IS FURTHER ORDERED that the defendant Williams is enjoined from using any of Oklahoma City's streets, alleys or other public rights-of-way for the purpose of laying pipeline and other equipment for the transport of natural gas and/or transport of natural gas in its existing pipelines that are currently using the public streets of Oklahoma City to the defendant Powersmith's Firestone Project without first obtaining a franchise from the voters of Oklahoma City.

Dated this 19th day of May, 1989.

/s/ David M. Cook
DAVID M. COOK
District Judge

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[8] *Okla. Gas and Electric Co. v. Total Energy, Inc.*, 499 P.2d 917 (Okla. 1972); *Bartlesville Electric Light & Power Co. v. Bartlesville Interurban Ry. Co.*, 26 Okla., 453, 109 P. 228 (1910).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA

No. CIV-89-519-A

WILLIAMS NATURAL GAS COMPANY,
Plaintiff(s),

vs.

THE CITY OF OKLAHOMA CITY, OKLAHOMA and
OKLAHOMA NATURAL GAS COMPANY,
Defendant(s).

[Filed April 13, 1989]

ENTER ORDER

The Court has been advised that the plaintiff, Williams Natural Gas Company and defendant The City of Oklahoma City, have reached an agreement on the First Cause of Action herein, being the condemnation claim for relief, both such parties having tendered to the Court an agreed order providing for agreed compensation to the City and granting right to immediate possession of the property sought to be condemned to the plaintiff. The agreeing parties acknowledge that entry of such order would permit the construction, but not use, of the proposed pipeline herein, and that use thereof, that is the transportation of natural gas through it, would remain subject to eventual ruling on the merits of the Second

Cause of Action concerning Oklahoma Natural Gas Company's franchise and issues related thereo.

The Court will consider entering the proposed agreed Order only after giving the remaining defendant, Oklahoma Natural Gas Company, an opportunity to be heard in its regard and such hearing is set for 9:30, Tuesday, April 18, 1989.

ABOVE ORDER ENTERED BY THE DIRECTION OF JUDGE WAYNE E. ALLEY.

CLERK
By: /s/ Louise R. Gates
Deputy

Copies to parties of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-89-519A

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation, and OKLAHOMA NATURAL GAS COMPANY, a Delaware corporation,
Defendants.

[Filed April 18, 1989]

ORDER

It appearing to the Court from the Complaint of the plaintiff, Williams Natural Gas Company (Williams), and the Answer of the defendant, City of Oklahoma City, Oklahoma (City), to-wit:

1. That Williams seeks to condemn a permanent easement and right-of-way across but under certain city streets more particularly described in the Complaint for the purpose of laying a pipeline pursuant to a Certificate of Public Convenience and Necessity issued to Williams by the Federal Energy Regulatory Commission (FERC).

2. That City has no defense to the taking sought.

3. That said taking and use shall not interfere with the public use and enjoyment of said streets.

4. That just compensation to the City of the property interests taken is approximately $50,000.00.

5. That Williams has the need for and right to immediate possession of the property sought to be condemned, provided:

(a) Williams shall deposit with the Clerk of this Court the sum of $50,000.00, which sum the City may draw from the Clerk at its pleasure.

(b) Said pipeline shall be constructed in accordance with the ordinances of City insofar as said ordinances pertain to the health and safety of the citizens of City.

IT IS THEREFORE ORDERED by the Court that subject to the conditions enumerated above, Williams is entitled to and is granted immediate possession of the easements sought to be condemned.

IT IS FURTHER ORDERED that the amount of just compensation for property interests taken shall be determined hereafter as provided by law.

s/ Wayne Alley
United States District Judge

APPROVED:

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-89-519-A

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
and OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendants.

[Filed May 1, 1989]

ORDER

This matter coming on this 1st day of May, 1989, upon plaintiff's application for an order staying certain proceedings in the District Court of Oklahoma County, Oklahoma in Case No. CJ-88-10553, the parties appearing by counsel, and the Court having heard the argument of counsel and being fully advised, finds:

1. That on April 18, 1989, this Court, over defendant Oklahoma Natural Gas Company's objection, entered its order allowing plaintiff, upon deposit of $50,000, to enter upon the rights-of-way sought to be condemned for the purpose of constructing the pipeline in question; that by issuing said order, this Court first exercised jurisdiction and authority over the easements sought to be condemned.

2. That on April 28, 1989, in said state court proceedings, that Court entered its order enjoining and restraining plaintiff "from using or occupying the public streets or other rights-of-way within Oklahoma City in order to construct or operate the pipeline and related facilities" which are the subject of this action.

3. That the order of the State Court is an interference with this Court's jurisdiction and should be stayed pending determination of the pre-emption issue.

4. The issue of pre-emption having been first presented to the State court, this Court will not proceed to decide that issue in advance of the state court decision on the issue if that be made within a reasonable time.

IT IS THEREFORE ORDERED by the Court, that all proceedings in Case No. CJ-88-10553 in the District Court of Oklahoma County, Oklahoma, restraining plaintiff from entering upon the public streeets and rights-of-way of the City of Oklahoma City for the purpose of constructing the pipeline which is the subject of this action, be, and the same are stayed pending determination of the pre-emption issue.

/s/ Wayne Alley
United States District Judge

APPROVED AS TO FORM:

/s/ William R. Burkett
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-89-519-A

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation; and OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendants.

[Filed May 30, 1989]

ORDER

By Order dated 18 April 1989, the Court granted the request of Williams Natural Gas Company (Williams) for the condemnation of certain property in the City of Oklahoma City, Oklahoma and for leave to commence construction of a pipeline on the condemned property. On 1 May 1989, the Court stayed enforcement of a temporary restraining order issued by the Honorable David M. Cook in parallel state proceedings in the district court for Oklahoma County. The state court's temporary restraining order barred Williams' pipeline construction on the property at issue. According to counsel for the parties, the pipeline construction was completed pursuant to the Court's Order.[1]

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[1] As a general matter, condemnation orders under the Natural Gas Act provide for the construction, maintenance, and operation of

During the course of this litigation, the Court has explicitly declined to address the federal preemption question—that is, whether the provisions of the Natural Gas Act (NGA) preempt the Oklahoma franchise requirement as it relates to the transportation of natural gas within the territorial limits of Oklahoma City. The state court reached this question first.

On 19 May 1989, Judge Cook ruled that the provisions of the NGA do not preempt the Oklahoma franchise requirement, noting that a pipeline company's nonfranchised use of city streets and the economic consequences of such use are matters of "legitimate local concern." *Oklahoma Natural Gas Company v. Smith Cogeneration, Inc.*, No. CJ-88-10553, slip op. at 5 (D. Ct. Okla. May 19, 1989). Effectuating his judgment, Judge Cook entered a permanent injunction as to Williams' nonfranchised use of the streets of Oklahoma City:

> Williams is enjoined from using any of Oklahoma City's streets, alleys or other public rights-of-way for the purpose of laying pipeline and other equipment for the transport of natural gas and or transport of natural gas in its existing pipelines that are currently using the public streets of Oklahoma City to the defendant Powersmith's Firestone Project without first obtaining a franchise from the voters of Oklahoma City.

Id. at 5. Williams, not surprisingly, seeks to avoid the state court result.

In conjunction with the intervenor Powersmith Cogeneration, Williams argues that this Court should authorize the operation of the pipeline on the condemned property

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pipelines. *See* 15 U.S.C. § 717f(c), (h). In the instant case, the construction element is now moot; the maintenance element is not an issue; and, as noted subsequently in text, the Court is not situated to address the operation element as qualified by Judge Cook's preemption ruling.

and, if necessary, enjoin the state court proceeding and enforcement of any orders issued therein to permit such operation. The Court need not concur in the wisdom of the state court decision, however, to find that it is barred from addressing the question of pipeline operation by the *Rooker* doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *see Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 295-97 (1970).

The *Rooker* doctrine bars a federal district court from acting as an appellate court for purposes of overriding a state court judgment, "even though the judgment may rest an erroneous resolution of constitutional or federal law issues." *Texaco, Inc. v. Pennzoil*, 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). The Second Circuit in the *Pennzoil* case described the considerations underlying the *Rooker* doctrine as follows:

> The doctrine stems from recognition that (1) state courts are just as obligated and competent as federal courts to decide federal constitutional questions (2) a path is available through the state appellate system to the Supreme Court, and that (3) waste of judicial resources and unnecessary friction between state and federal courts might ensue if a federal district court intervened to overrule a state court decision.

The Court finds each of these considerations to be implicated here and, consequently, the *Rooker* doctrine is controlling.

To support its argument for relief, Williams cites the Tenth Circuit's recent decision in *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, No. 86-1885 (10th Cir. May 3, 1989). In *Seneca-Cayuga*, the State of Oklahoma sued certain Indian tribes seeking to exercise regulatory authority over Indian operation of bingo games in Indian

country. The state trial court ruled that it lacked subject matter jurisdiction over the controversy. On appeal, the Oklahoma Supreme Court reversed. The court rejected the "strict territorial approach" to defining the boundaries of tribal sovereign immunity in favor of an analysis focusing on federal preemption and the proposed regulation's infringement on tribal self-government. *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 84 (Okla. 1985). Under this analysis, the Oklahoma Supreme Court concluded that the state court did, in fact, have jurisdiction over the Indian defendants. *Id.* at 91.[2] Subsequently, the Indian litigants commenced an action in federal district court for declaratory and injunctive relief as to the state regulatory efforts. The federal district court declined to abstain at the request of the State of Oklahoma, and proceeded to enjoin the state court proceedings.

Williams' reliance on *Seneca-Cayuga* is misplaced for at least two reasons. First, in *Seneca-Cayuga*, the state

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[2] In reaching this result on the immunity question, the Oklahoma Supreme Court held that federal law did not preempt state regulatory efforts as to the Indian bingo operations. 711 P.2d at 90. Based on this preemption ruling, Williams argues that *Seneca-Cayuga* is on all fours with the instant case. A careful reading of the Tenth Circuit decision, however, suggests otherwise. In *Seneca-Cayuga*, the Tenth Circuit does not appear to have attributed any legal significance to the Oklahoma Supreme Court's preemption ruling. It noted that the Oklahoma Supreme Court's unorthodox approach to the sovereign immunity question, which incorporated the preemption issue as an analytical predicate, had never been employed in federal court and was unlikely to be so employed. *Seneca-Cayuga*, slip. op. at 15 n.7. The *Younger* analysis in *Seneca-Cayuga*, moreover, presumes that a final state court judgment as to the scope of federal preemption over Indian bingo had yet to be entered. *Id.* at 12 (noting the need for a determination as to whether "the federal law has not preempted state authority"). Therefore, the Tenth Circuit addressed only the state court ruling on the sovereign immunity question, without reference to the mode of analysis involving federal preemption. The state court judgment was, therefore, one of jurisdictional significance.

court lacked the jurisdiction to entertain the suit against the Indian tribes, irrespective of the Oklahoma Supreme Court's decision. The parameters of tribal sovereign immunity are defined exclusively by federal law. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Indian Country, U.S.A. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 976 (10th Cir. 1987), *cert. den. sub nom. Oklahoma Tax Comm'n v. Muskogee (Creek) Nation*, 108 S.Ct. 2870 (1988). Yet, the Oklahoma Supreme Court purported to hold jurisdiction to be proper employing an analysis that "has never been applied by a federal court to sovereign immunity questions . . . . [and] is unlikely to be so applied." *Seneca-Cayuga*, slip op. at 15 n.7.

The Oklahoma Supreme Court's error is not the material issue here but, rather, its effect. The court's error postulated a jurisdictional footing for the lawsuit that, in fact, never existed. On the other hand, in the instant case, there can be no doubt that the district court for Oklahoma County had subject matter jurisdiction over the preemption question. Williams merely quarrels with the correctness of the state court's ruling on this point of federal substantive law. Under *Rooker* and its progeny, however, this is not a proper subject for inquiry by this Court.

Second, in *Seneca-Cayuga*, all avenues of state appellate review were closed to the adversely affected Indian litigants. The Oklahoma Supreme Court had ruled on the immunity question, albeit erroneously, leaving the Indians with the prospect of enduring unwarranted litigation in the state courts. Conversely, in the instant case, Williams is free to pursue its arguments for avoiding the franchise requirement, including those relating to federal preemption, on appeal in the state system. The concerns underlying the *Rooker* doctrine make readily apparent the desirability and, indeed, necessity for this Court to stay its hand.

Williams' request for authorization to operate its pipeline on the condemned Oklahoma City property and for an injunction as to the parallel state proceedings is accordingly DENIED. The Court does find, however, that its Order today "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Lear Siegler, Inc. v. Adkins*, 330 F.2d 595, 598 (9th Cir. 1964). Leave to appeal under section 1292(b) is therefore GRANTED.

It is so ordered this 30th day of May, 1989.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States District Judge

APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-000

WILLIAMS NATURAL GAS COMPANY

ORDER ISSUING CERTIFICATE

(Issued February 16, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On October 28, 1988, Williams Natural Gas Company (WNG) filed an application, pursuant to section 7(c) of the Natural Gas Act (NGA), for a certificate of public convenience and necessity authorizing it to construct, own and operate a 12.4-mile pipeline and related facilities for the purpose of transporting natural gas to a cogeneration plant being constructed by PowerSmith Cogeneration Project Limited Partnership (PowerSmith) near Oklahoma City, Oklahoma. WNG also requests authorization to implement a newly designed transportation rate, to be used in conjunction with its Rate Schedule ITS rate, for gas transported to the plant. For the reasons discussed herein, we will issue WNG a certificate, subject to conditions, authorizing construction of the pipeline and related facilities and will authorize the use of the combined rate.

Background

PowerSmith [1] is currently constructing a cogeneration plant [2] on the grounds of the Firestone Tire and Rubber Company (Firestone) manufacturing plant located in Oklahoma City, Oklahoma. The estimated completion date of the cogeneration plant is June 9, 1989, at a total estimated cost of $79.6 million.

The plant will be a combined-cycle 106 MW cogeneration plant. Electricity generated by the plant is to be sold to Oklahoma Gas and Electric Company (OG&E) and any steam produced will be sold to Firestone for use in its tire manufacturing operations. Sales agreements have been executed by PowerSmith with both Firestone and OG&E for the respective products of the plant. The power sales agreement between PowerSmith and OG&E has been approved by the Oklahoma Corporation Commission.

Once the plant commences commercial operations, it will rely exclusively on natural gas to generate electricity and steam. PowerSmith has contracted with Ladd Gas Marketing, Inc. (Ladd),[3] to supply the plant's gas requirements under a long-term gas supply contract.[4]

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[1] PowerSmith is a limited partnership consisting of two general partners, ENIGEN, Inc., and Firestone Cogeneration Joint Venture, and four limited partners, Energy National, Inc., Prudential Interfunding Corporation, John Hancock Mutual Life Insurance Company and Hydra-Co.

[2] The cogeneration facility was originally certified as a qualifying cogeneration facility in *Firestone Cogeneration Joint Venture*, 33 FERC ¶ 62,481 (1985), and recertified as a qualifying cogeneration facility in *PowerSmith Cogeneration Project, Limited Partnership*, 42 FERC ¶ 62,121 (1988).

[3] Ladd is a wholly owned subsidiary of Ladd Petroleum Corporation. Ladd Petroleum Corporation is an affiliate of General Electric Company, which will carry out the actual design and construction of the PowerSmith cogeneration plant.

[4] Ladd has contracted with PowerSmith to provide all of the plant's gas requirements for a term of 15 years from the gas commercial operation of the cogeneration plant begins.

PowerSmith, Ladd and WNG have entered into a transportation agreement under which WNG has agreed to transport gas to the plant on an interruptible basis under WNG's section 284.221 blanket transportation certificate.[5] The pipeline and related facilities proposed in the instant application by WNG are to be constructed to transport this gas to the cogeneration plant.

Proposal

WNG seeks a certificate of public convenience and necessity authorizing it to construct, own and operate approximately 12.4 miles of 12-inch diameter natural gas pipeline along with related measuring, regulating and appurtenant facilities to connect its existing pipeline system with the PowerSmith cogeneration facility. The pipeline is to extend from an interconnection with WNG's Cement pipeline in Cleveland County, Oklahoma, to a delivery point at or near the cogeneration plant.[6]

The pipeline and related facilities are expected to cost $2,373,700 which WNG plans to finance with internally generated funds. Ladd is to reimburse WNG for the difference, if any, between the cost of the facilities [7] and the amount of transportation revenues collected by WNG during the first three years of service. The transportation revenues collected by WNG from Ladd for the transportation service, less the GRI surcharge, annual charge adjustment (ACA), fuel and gathering charges, are to be applied towards Ladd's payment of the costs expended

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[5] WNG was issued a Part 284 blanket transportation certificate in *Northwest Central Pipeline Corp.*, 38 FERC ¶ 61,169 (1987).

[6] The interconnection with WNG's Cement pipeline is to be in Section 26, Township 10 North, Range 4 West, in Cleveland County, Oklahoma. The point of delivery to the cogeneration plant is to be in Section 8, Township 11 North, Range 4 West, in Oklahoma County, Oklahoma.

[7] The cost of the facilities is not to exceed $3.3 million.

by WNG for construction of the facilities. The agreement stipulates that three years after initial deliveries, WNG will collect a lump sum payment from Ladd for any remaining out-of-pocket costs (i.e. facility costs in excess of transportation revenues collected).

The agreement has a primary term of 15 years commencing on the date the plant begins commercial operation, which shall be no later than June 1, 1990. The agreement may be extended by mutual agreement of the parties for up to three additional five-year periods. Either WNG or Ladd may terminate the agreement by written notice 180 days prior to the end of the 15-year period or prior to the end of any successive 5-year period.

The agreement provides for the transportation of up to 27,400 Mcf of gas per day to be received at any available receipt point located on WNG's system not upstream of the interconnection between WNG's Cement pipeline and its South-of-Blackwell pipeline and delivered at the plant delivery point. The interruptible transportation service to be provided by WNG will be by backhaul. Under the agreement, Ladd is required to transport 100 percent of PowerSmith's gas requirements on WNG's system as long as WNG has sufficient capacity. WNG estimates that the annual volume of gas transported will be approximately 9,000 Mcf.

WNG proposes to charge Ladd a combination rate for transporting the gas. The rate may vary from time to time but cannot exceed a maximum contractual rate.[8] It will consist of a combination of WNG's Rate Schedule, ITS rate and a proposed rate, designated as the Rate

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[8] The current maximum rate, as set forth in WNG's application, is 17.47 cents per Mcf including GRI and ACA charges but excluding gathering and fuel charges. The maximum rate will vary according to gathering and fuel costs. In the event the maximum contractual rate plus gathering and fuel charges exceeds 27 cents per Mcf, the agreement provides that Ladd and PowerSmith may jointly terminate the agreement.

Schedule X-23 rate. The ITS rate is to be used to reflect the transportation charge for the gas from the points of receipt to the interconnection with the proposed lateral. The X-23 rate is to be designed to reflect the cost of service for transportation through the new lateral. WNG asserts that charging Ladd its ITS rate and the X-23 rate, in conjunction, for the gas transported to PowerSmith will prevent the costs, and consequently the risks associated with the new facilities, from being shifted to any of WNG's other customers. WNG requests that the X-23 rate be a stand-alone rate due to the reimbursement arrangement with Ladd and the omission of the cost of the new facilities from its general system rate base.

Interventions

After due notice by publication in the *Federal Register* on November 7, 1988 (53 Fed. Reg. 45,960), timely unopposed motions to intervene supporting the application were filed by Firestone, PowerSmith and Ladd.[9] A timely motion to intervene opposing the application was filed by Oklahoma Natural Gas (ONG). Answers to ONG's motion to intervene were filed by WNG, PowerSmith and Ladd.

The answer filed by Ladd opposes ONG's motion to intervene in all respects.[10] ONG is a local distribution company serving the area in and around the cogeneration plant. As such, ONG is in direct competition for the business of PowerSmith. Accordingly, we will grant ONG's motion to intervene as it has a substantial interest which will be directly affected by the outcome of this proceeding that cannot be adequately represented by any other party.

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[9] Timely unopposed motions to intervene are granted by operation of Rule 214.

[10] We assume this includes that Ladd opposes the granting of ONG's intervention.

In its intervention opposing the application, ONG contends that (1) the Commission lacks jurisdiction over the proposal, (2) the application fails to provide evidence of adequate gas supply, (3) the Commission must explore alternative proposals, (4) the proposed rate treatment involves discriminatory discounting, and (5) the provision allowing WNG to provide 100% of the transportation service to PowerSmith over the life of the agreement is anticompetitive. ONG asserts that WNG's application should either be dismissed or set for hearing.

WNG, Ladd and PowerSmith counter the arguments raised by ONG in their answers. WNG notes that ONG's assumption that the proposed lateral will be connected to WNG's gathering facilities is inaccurate. WNG further notes that while Ladd has a best efforts obligation under its supply contract to provide gas produced in Oklahoma, its transportation agreement with Ladd and PowerSmith does not preclude the transportation of gas which may be produced outside of Oklahoma. WNG advises that the receipt points listed in Exhibit A of the transportation agreement include receipt points in Kansas and Wyoming and interconnections with other interstate pipelines. WNG also points out that the proposed line interconnects in an area where potential exchanges with Natural Gas Pipeline Company of America could occur. Additionally, WNG states that ONG simply ignores the fact that the gas received by WNG for transportation, even if it originates in Oklahoma, would be commingled in the WNG system and would, at least in part, be distributed to consumers in other states.

WNG, Ladd, and PowerSmith assert that adequacy of gas supply and competitive alternatives should not be issues in the instant proposal as PowerSmith is satisfied that Ladd can live up to its obligation to supply gas and PowerSmith has already determined that an arrangement with ONG would be competitively inferior to that which it has chosen.

ONG filed a supplement to its intervention on January 18, 1989, which it contends is appropriate in light of additional information which it received subsequent to the filing of its motion to intervene.[11] Objections to this supplement were filed by WNG and PowerSmith on January 27 and January 30, 1980, respectively. Both WNG and PowerSmith assert that the supplement filed by ONG is nothing more than an answer to the answers previously filed by them. Thus, WNG & PowerSmith assert that this filing is improper as an answer to an answer under section Rule 213(a)(2) of the Commission's Procedural Rules.

ONG's supplement is dedicated primarily to rebutting the arguments raised by WNG, Ladd, and PowerSmith in their answers to ONG's intervention. Rule 213(a)(2) was designed to prevent this type of filing. Accordingly, we find that ONG's supplement is an improper filing and the arguments raised therein will not be entertained in this order.

Comments to the application were filed by the Oklahoma Corporation Commission (OCC) on February 1, 1989. We will treat this filing as a late motion to intervene. No parties have opposed the filing and allowing the intervention will not delay the proceeding or prejudice the other parties. Further, as the state agency charged with overseeing the regulation of public utilities in the State of Oklahoma, the OCC has a substantial interest in

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[11] This additional information includes (1) a gas sales agreement dated August 7, 1987, between Ladd Petroleum Corp. (seller) and Firestone Cogeneration Joint Venture Limited (buyer); (2) A transportation agreement dated August 7, 1987, between Ladd Petroleum Corp. and Firestone Cogeneration Joint Venture; (3) an option agreement for the transportation of natural gas dated Sept. 30, 1988, among Ladd, PowerSmith and the Williams Companies, Inc. (intrastate pipeline option agreement); and (4) an option agreement for the transportation of natural gas dated Sept. 30, 1988, among Ladd, PowerSmith and Williams Natural Gas Co. (option agreement no. II).

this proceeding which cannot be adequately represented by any other party. Accordingly, the OCC will be made a party in this matter.

The OCC states that on December 9, 1988, ONG filed an application with the OCC for the issuance of a show cause order to WNG regarding whether the activities proposed in the instant application constitute local transportation and distribution of gas which should be regulated by the OCC. The OCC requests that we "(1) defer consideration . . . until the OCC has conducted an evidentiary hearing to ascertain certain facts, (2) conduct a joint hearing with the OCC to ascertain pertinent facts or (3) conduct an evidentiary hearing . . . to determine if facts exist which would support the F.E.R.C. jurisdiction rather than issuing an order without an evidentiary hearing."

Discussion

At the outset, we note that the objections of ONG have raised no issues of material fact in regard to the proposal which require additional inquiry by the Commission. Further, the OCC has failed to set forth any ascertainable factual dispute which warrants delaying or deferring a decision in this matter or which warrants the expenditure of valuable Commission resources in conducting a hearing. We find that sufficient facts upon which to base a decision in this matter are set forth in the filings of the parties. Accordingly, we will deny ONG's and the OCC's requests for hearing in this matter.[12]

Jurisdiction: ONG asserts that the facilities proposed by WNG are subject to local rather than federal regulation as "the proposal, notwithstanding that it is cast as

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[12] ONG filed a motion on February 3, 1989, to compel WNG to respond to a data request. In light of our determination that a hearing is unnecessary in this matter, we will deny this motion.

an application to expand service by an interstate pipeline, in fact relates to service in the nature of distribution or intrastate transportation." [13] In support of this argument, ONG asserts that (1) the gas actually delivered to PowerSmith will originate in Oklahoma, will never be commingled with any other gas stream and will never cross state lines, (2) the facilities will all be constructed in Oklahoma and will be attached to WNG's gathering facilities, and (3) the transaction will affect only parties in Oklahoma.

We find that the facilities proposed by WNG are within the jurisdiction of the Commission. First, we note that ONG's assertion that the proposed lateral will be connected to gathering facilities is incorrect. The proposed lateral is to interconnect with WNG's Cement pipeline. WNG's Cement pipeline is a high-pressure 16-inch line capable of transporting large volumes of gas. Its primary function is to transport gas that has been gathered from various fields in western Oklahoma to WNG's interstate system for transmission to points both in and out of Oklahoma. It is clearly part of WNG's integrated interstate pipeline system and, as such, does not qualify as a gathering facility.

Second, the proposed facilities are not exempt from Commission jurisdiction as local distribution facilities. In determining what constitutes local distribution, we have previously stated,

> the term "local distribution of gas" connotes a network of small local lines that transmit the gas from large interstate pipelines to individual consumers spread about in a local geographic area. This is also consistent with how the term has been applied by the Commission and industry for many years . . . . Furthermore, the legislative history of section 1(b) [of the NGA] suggests that Congress did not intend

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[13] Motion of ONG at p. 8.

> to create a definition of local distribution that would apply to the tie-in facilities that connect an interstate pipeline to an end-user. (Footnote omitted.)[14]

In the same vein, we find that the facilities proposed by WNG in this case bear little resemblance to a local distribution system. The proposed lateral will tie WNG's interstate system directly to an end-user—PowerSmith. The lateral will be an essential and integral element of the interstate transportation of natural gas.[15] Further, we recently determined in *Panhandle Eastern Pipe Line Co.*, 42 FERC ¶ 61,076 (1988), that the transportation of gas directly to an end-user by an interstate gas pipeline did not involve local distribution. In rejecting the assertion by a local distribution company that the transaction involved local distribution, we stated that "irrespective of any local effects resulting from the by-pass, we believe that the transportation service at issue here essentially concerns federal interests, that is, those embodied in developing interstate transportation policy that provides consumers with a variety of supply options by promoting a competitively priced spot market for natural

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[14] *Mojave Pipeline Co.*, 42 FERC ¶ 61,351, at p. 62,001 (1988). This determination was based on Supreme Court determinations of what constitutes local distribution in *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950) and *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951).

[15] The fact that the molecules of gas actually delivered to PowerSmith will originate in Oklahoma does not alter our view. The transportation will be effected through the use of interstate pipeline facilities. Moreover, the transportation will be carried out by means of a backhaul arrangement that calls for gas to be delivered to WNG at a number of designated receipt points (some in Kansas and Wyoming) and commingled with the interstate stream of gas in WNG's system. We find that this is not a transaction that can be effectively regulated by the State of Oklahoma. *See, e.g., Columbia Gas Transmission Corp.*, 10 FERC ¶ 61,111 (1980) (certificating transportation by an interstate pipeline where the gas originated and was consumed within the same state.)

gas." Accordingly, we find that the instant proposal does not involve local distribution.

In sum, we find that the facilities proposed by WNG will involve an expansion of WNG's interstate pipeline system which is used to transport gas in interstate commerce. Accordingly, the facilities WNG proposes to construct in its application are subject to the Commission's jurisdiction and to the requirements of subsections (c) and (e) of section 7 of the NGA.

Gas Supply: ONG contends that the failure of WNG's application to set forth any information in regard to Ladd's available gas supply is a serious omission. Under the circumstances of this case, we do not agree. In the first place, there is no question in this case that the proposal is based on a real transaction. PowerSmith has contracted directly with Ladd to purchase gas. Moreover, the sale by Ladd is not subject to our jurisdiction under the NGA. Further, WNG does not propose to place the cost of the new facilities into its general rate base. Under this arrangement, WNG's other customers will bear no portion of the costs of the facilities and are protected from the risk that the project may fail. If Ladd should fail in its obligations to PowerSmith, PowerSmith has the protection of its contract with Ladd. Under such circumstances, we find that specific evidence on the amount of supplies available for Ladd to meet its contract is unnecessary.

Alternative Proposals: ONG contends that before the Commission can determine if WNG's proposal is in the public interest, it must first consider and compare ONG as an alternative supplier. ONG states that it has been unable to determine why PowerSmith chose not to deal with it rather than Ladd. In this regard, ONG hints that there may have been improper dealings between the parties leading up to the agreement due to the affiliate relationship between Ladd and General Electric Company (GE), which has been engaged to design and construct

the plant. Relying on Order No. 497,[16] ONG asserts that a hearing is required to investigate this possible improper activity.

ONG's reliance on Order No. 497 is misplaced under the circumstances of this proposal. Order No. 497 was designed to prevent preferential treatment of an affiliated gas marketer by an interstate pipeline in the transportation of natural gas. Order No. 497 is inapplicable in the instant case. GE is not an interstate pipeline and Ladd is not affiliated with WNG. GE is designing and constructing the PowerSmith facilities and is providing the gas turbines to be used in the plant. We fail to see how such a relationship could equate into improper anticompetitive activity in the instant case and ONG has failed to point out any specific abuse. Without more, we see no reason to expend Commission resources investigating this improbable allegation.

We also conclude that it is unnecessary at this stage to compare service available to PowerSmith through ONG with the service which PowerSmith has already chosen. We assume PowerSmith has carefully analyzed the various gas supply alternatives available to it, including service through ONG. The nature of the cogeneration plant's operations carries with it a built-in incentive for PowerSmith to acquire a long-term reliable supply of gas at the lowest possible price. PowerSmith has determined that the Ladd-WNG alternative is the superior alternative for its needs. Absent some showing of unfair, deceptive or discriminatory practice, of which we may take cognizance, we see no reason to deny this certificate which is necessary to enable PowerSmith to purchase gas in the market.

Transportation Requirement: Section 10 of the transportation agreement requires Ladd to transport 100 per-

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[16] *Inquiry into Alleged Anticompetitive Practices Relating to Marketing Affiliates of Interstate Pipelines*, Order No. 497, *FERC Statutes and Regulations* ¶ 30,820 (1988).

cent of PowerSmith's gas requirements on WNG's system unless WNG is unable to transport all of the necessary gas or unless PowerSmith and Ladd jointly agree to terminate the agreement if the cost of transportation exceeds 27 cents per Mcf. ONG argues that this provision is anticompetitive and contrary to current Commission policy on open access.

We find that this sole-transporter provision conflicts with our objective of creating a competitive natural gas market as promulgated in Order Nos. 380 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,571] and 436 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665]. We have previously stated that

> Tariff provisions which deprive customers of the necessary flexibility to take advantage of price competition in order to operate as effectively as possible are clearly contrary to the Commission's stated purpose on competition.[17]

The sole-transporter provision in WNG's transportation agreement would require Ladd to transport 100 percent of PowerSmith's requirements over WNG's system for 15 years. This provision is anticompetitive on its face as it effectively denies Ladd the opportunity to utilize more economical transportation service should such service develop and, consequently, hinders the development of alternatives. Further, we see no justification for such inflexibility when WNG will recover the cost of the pipeline and related facilities through transportation charges and a possible lump-sum reimbursement from Ladd within three years of commencement of service. Accordingly, the certificate authorization granted to WNG will be conditioned on the removal of this provision.

Public Convenience and Necessity: Authorizing WNG to construct the lateral and related facilities necessary

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[17] *Panhandle Eastern Pipe Line Co.*, 38 FERC ¶ 61,164, at p. 61,469 (1987) (eliminating a sole-supplier provision from a direct sale agreement).

to transport gas to PowerSmith will result in benefits to Ladd, WNG, PowerSmith, Firestone and OG&E. Ladd and WNG will both benefit from incresed revenues from their respective gas sales and transportation services that they will provide to Powersmith. PowerSmith will benefit by having access to competitively priced gas through Ladd. This will in turn benefit both OG&E and Firestone as OG&E will have a new source of reasonably priced electricity and Firestone will be able to operate its tire manufacturing processes more efficiently by using the steam produced by PowerSmith. WNG's customers will also benefit as they will obtain the benefit of increased throughput on WNG's currently under-utilized system. Further, operation of the cogeneration plant will help bolster Oklahoma's economy benefitting the residents of the state.

We realize that authorizing the constructon of the lateral will result in the gas being transported by WNG directly to an end-user located in ONG's distribution area. However, we are reluctant to shield local distribution companies from the forces of competition which we have attempted to foster in the natural gas industry. This is especially true in light of the facts in the instant case. ONG has been unsuccessful in its attempt to compete for a new customer. However, in the absence of any evidence of unfair competition, we see no reason to depart from our belief that the public interest is best served by allowing the market to determine who will provide service in cases such as this. Accordingly, we find that it is in the present and future public convenience and necessity to authorize WNG to construct the 12.4-mile lateral and related facilities to transport gas to PowerSmith.

Rate Treatment: WNG proposes to charge Ladd a combined transportation rate consisting of the proposed X-23 rate, which is designed to recover the cost of service associated with the proposed facilities, and WNG's

ITS transportation rate. WNG proposes to discount its ITS rate to Ladd, if necessary, to ensure that the overall rate does not exceed the maximum contractual rate. In the event the maximum contractual rate plus gathering and fuel charges exceeds 27 cents per Mcf, the agreement allows Ladd and PowerSmith jointly to terminate the agreement.

ONG asserts that allowing WNG to discount its ITS rate rather than the X-23 rate would result in discriminatory discounting which might detrimentally affect WNG's other customers. This contention ignores the fact that WNG has already been authorized to discount selectively under Part 284 of our regulations. Specifically, section 284.7(d)(5) allows pipelines transporting under a blanket certificate or under the self-implementing provisions of Subpart B to offer selective discounts between a maximum and minimum rate. WNG, which transports under a blanket certificate, has such rates on file. They were approved in Docket No. RP86-32-006.[18] Of course, even though WNG is authorized to offer discounts selectively, it may not discriminate unduly. Should any of WNG's customers perceive that WNG is offering discounts in an unduly discriminatory manner, it may file a complaint with the Commission.

In this case, ONG's allegations do not indicate that the discount proposed by WNG is unduly discriminatory. ONG does not suggest, for instance, that WNG is unwilling to offer a similar discount to ONG. Rather, ONG's claim is that the discount will result in competition that will be detrimental to ONG. However, our reason for allowing such discounts in the first place is to encourage competition. Thus, WNG's proposal to discount its ITS rate, if necessary, is consistent with our regulations.

The methodology employed by WNG to design the proposed incremental X-23 rate, in combination with its dis-

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[18] *Williams Natural Gas Co.*, 43 FERC ¶ 61,227 (May 5, 1988).

counted ITS rate, is appropriate. Thus, we will authorize WNG to charge the combined X-23 rate and ITS rate for the transportation service to be performed for Ladd. The X-23 rate will be separately stated from WNG's ITS rate and the ultimate level of the X-23 rate will be conditioned on the determination in WNG's pending general rate case in Docket No. RP87-33-000.

The requirement that Ladd reimburse WNG for its out-of-pocket facility costs through the separately stated X-23 revenues recovered during the first three years of operation and to make a lump-sum payment for the unpaid balance at the end of that period could result in double recovery if WNG is permitted to continue charging the X-23 rate after the lump-sum payment is made. The X-23 rate is designed to recover the out-of-pocket cost of the PowerSmith lateral over a normal depreciation schedule based on the economic life of the facilities utilizing WNG's currently effective depreciation rate of 2.8 percent. However, under the lump-sum payment provision, the cost of the facilities would be fully recovered after three years and there would be no justification for WNG to continue to collect a return on and of its investment through the X-23 rate beyond that time. Thereafter, WNG would be entitled to recover only its operating costs associatetd with the lateral which are 0.73 cent per Mcf. Therefore, we will authorize the lump-sum payment but limit the X-23 rate to 0.73 cent per Mcf after the lump-sum payment is made unless WNG files to change the rate.

A review of the environmental assessment prepared to evaluate the environmental impact of the proposed construction indicates that it will not constitute a major federal action significantly affecting the quality of the human environment.

At a hearing held on February 15, 1989, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the

application and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record.

The Commission orders:

(A) A certificate of public convenience and necessity is issued to WNG authorizing the construction and operation of a 12.4-mile pipeline and related facilities as described in this order and as more fully described in the application.

(B) WNG is authorized to charge a composite transportation rate consisting of an X-23 rate for transportation on the 12.4-mile pipeline authorized in paragraph (A) and WNG's ITS rate for transportation on WNG's main system. The ultimate level of the X-23 incremental rate is conditioned on the determination in Docket No. RP87-33-000.

(C) The certificate issued in paragraph (A) is conditioned on the removal of the sole-transporter provision contained in section 10 of the transportation agreement.

(D) The X-23 revenues are the only portion of the composite rate to be applied toward recovering the cost of the proposed facilities. The X-23 rate is limited to 0.73 cent per Mcf for continued service after the lump-sum payment is made unless WNG files to change the rate.

(E) The certificate issued in paragraph (A) is conditioned on WNG's compliance with Part 154 and paragraphs (a), (c)(3), (c)(4), (e), and (g) of section 157.20 of the Commission's regulations.

(F) The facilities shall be completed and placed in actual operation, as provided by paragraph (b) of section 157.20 of the Commission's regulations, within six months of the date of this order.

(G) The late intervention of the Oklahoma Corporation Commission is granted.

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-001

WILLIAMS NATURAL GAS COMPANY

ORDER DENYING REHEARING AND CLARIFYING PRIOR ORDER

(Issued May 31, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On February 16, 1989, the Commission issued an order in Docket No. CP89-93-000 [1] authorizing Williams Natural Gas Company (WNG) to construct and operate a 12.4-mile gas pipeline lateral and related facilities to transport gas to a cogeneration plant being constructed by PowerSmith Cogeneration Project Limited Partnership (PowerSmith). Oklahoma Natural Gas Company (ONG) and WNG each filed a timely request for rehearing of that order. Contemporaneously with its request for rehearing, ONG filed a motion for stay of the February 16 order. ONG's motion for stay was subsequently denied by a Commission order issued March 31, 1989.[2]

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[1] *Williams Natural Gas Co.*, 46 FERC ¶ 61,160 (1989).

[2] *Williams Natural Gas Co.*, Order Granting Rehearing for Further Consideration and Denying Motion for Stay, 46 FERC ¶ 61,408 (1989).

For the reasons discussed herein, we will deny both ONG's and WNG's requests for rehearing. We will, however, clarify that portion of the order concerning the rate treatment of the proposal.

Background

The PowerSmith plant is being constructed by PowerSmith in Oklahoma City, Oklahoma. The plant is to be located adjacent to a tire manufacturing plant owned by Firestone Tire and Rubber Company (Firestone). The steam and electricity produced by the cogeneration facility are to be sold to Firestone and Oklahoma Gas and Electric Company (OG&E), respectively.

Gas is to be supplied to PowerSmith by Ladd Gas Marketing under a 15-year primary term contract and transported by WNG under its section 284.221 blanket transportation certificate. Pursuant to a transportation agreement between WNG, PowerSmith and Ladd, WNG is to transport up to 27,400 Mcf of gas per day on an interruptible basis from any available receipt point on WNG's system not upstream of the interconnection between WNG's Cement pipeline and its South-of-Blackwell pipeline, and delivered at the plant delivery point. The agreement contained a sole-transporter clause which required Ladd to transport 100 percent of PowerSmith's gas requirements on WNG's system as long as WNG has sufficient capacity.

The lateral is to extend from an interconnection with WNG's Cement pipeline in Cleveland County, Oklahoma, to a delivery point at or near the PowerSmith plant. Total cost of the lateral and related facilities is expected to be $2,373,700, which WNG plans to finance with internal funds. Ladd is to reimburse WNG for the difference, if any, between the cost of the facilities, not to exceed $3.3 million, and the amount of transportation revenues collected by WNG during the first three years

of service. The transportation revenues collected by WNG from Ladd for the transportation service are to be applied toward Ladd's payment of the costs expended by WNG for construction of the facilities. Three years after initial deliveries, WNG will collect from Ladd a lump-sum payment for any remaining out-of-pocket costs.

ONG filed an intervention opposing the proposal. The February 16, 1989 order rejected the majority of ONG's arguments and found that the proposal was in the public convenience and necessity. Thus, the order issued WNG a certificate authorizing the construction and operation of the lateral and authorizing WNG to charge the combined rate for transportation service for Ladd to PowerSmith. The Commission found merit in ONG's assertion that the sole-transporter provision was anticompetitive. The order conditioned the certificate on the removal of the sole-transporter provision from the agreement and limited the Rate Schedule X-23 rate to .73 cents per Mcf after the lump-sum payment was made after three years of service, unless WNG filed thereafter to change the rate. This rate limitation was imposed to prevent double recovery by WNG of the fixed costs of the facilities after the lump-sum payment.

On May 5, 1989, PowerSmith filed a letter, with attachments, explaining the status of a proceeding filed in Oklahoma State Court by ONG against WNG, PowerSmith, and Ladd in which ONG is seeking to enjoin construction of the pipeline lateral and transportation service to PowerSmith under an Oklahoma franchise law.[3] The letter also indicates that WNG has filed suit in the United States District Court for the Western District of Oklahoma seeking to condemn, pursuant to section 7(h) of the NGA, rights-of-way in Oklahoma City for the

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[3] *Oklahoma Natural Gas Co. v. Smith Cogeneration Inc. et al.*, Case No. CJ-88-10553 (D. Ct. Okla. County).

lateral and to quiet title to the rights-of-way against ONG's assertion under the franchise law.[4]

ONG filed a letter with the Commission on May 15, 1989, objecting to the letter as an improper answer to a request for rehearing under the Commission's procedural rules.

We find that the letter and attachments submitted by PowerSmith is not an answer to ONG's request for rehearing. It merely contains information regarding the status of cases related to this proceeding presently pending in state and federal courts in Oklahoma. None of the information contained therein has any bearing on our determination in this proceeding as to whether WNG's proposal is required by the public convenience and necessity. Accordingly, while informative, this information has not been considered in our resolution of the rehearing requests.[5]

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[4] *Williams Natural Gas Co. v. The City of Oklahoma City et al.*, No. CIV-89-519-A (W.D. Okla.).

[5] On May 19, 1989, the Oklahoma District Court issued a declaratory judgment in Case No. CJ-88-10553 in which it upheld an injunction stopping WNG from using the streets, alleys or other public rights-of-way for laying pipeline necessary to transport gas to PowerSmith without first obtaining a franchise from the voters of Oklahoma City. The court based its determination on the decision in *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Ser. Comm'n.*, 341 U.S. 329 (1951). The state court determined that the transportation of natural gas to PowerSmith, like direct sales to end-users, is a matter of legitimate local concern subject to the franchise law and not preempted by the NGA.

It is our view that the state court's determination is erroneous. Under section 1(b) of the NGA, the Commission has plenary regulatory authority over all interstate transportation of natural gas. The direct transportation service to be provided by WNG to PowerSmith through the high pressure lateral involves interstate transportation and at no point becomes local distribution. Therefore, the Commission has exclusive jurisdiction over the proposal. *See* Panhandle Eastern Pipe Line Co., 42 FERC ¶ 61,076, at pp. 61,348-9 (1988), appealed *sub nom., Michigan Consolidated Gas Co.*, No. 88-

ONG's Request for Rehearing

ONG argues that the Commission erred in the following respects in authorizing WNG to construct and operate the lateral:

(1) By failing to find that the facilities to be constructed and the transportation service to be provided are within the jurisdiction of the OCC rather than the Commission as (1) all gas to be used in the transactions will be produced, transported, and consumed in Oklahoma, (2) the Cement pipeline from which the lateral is to extend is a gathering facility, and (3) the transportation to PowerSmith involves local distribution.

(2) By determining that the Cement pipeline was an interstate pipeline without holding an evidentiary hearing as such a determination involved a material issue of fact.

(3) By finding that the proposal was in the public convenience and necessity.

(4) By failing to set the matter for hearing.

(5) By failing to defer to the request of the OCC to hold hearings to determine the jurisdictional questions involved and to resolve other factual matters.

(6) By failing to investigate issues raised by ONG and by failing to obtain pertinent information concerning the transaction available only to the WNG, Ladd and PowerSmith.

(7) By failing to require WNG to respond to data requests submitted by ONG.

1062 (D.C .Cir.). We note also that the issue of whether Commission certificate authority preempts state authority is on appeal in *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, No. 88-1650 (6th Cir.).

(8) By failing to find that there is a better alternative to the proposal—namely service by ONG.

(9) By finding that a showing of adequate gas supply by Ladd was not required under the facts of the instant proposal.

(10) By failing to follow established policy in regard to protecting LDC's without adequate explanation.

(11) By protecting private, rather than public, interests.

We discussed and rejected each of these arguments in our February 16, 1989 order. Except for the following comments in regard to several of these issues, we see no reason to expand further on the determinations which were made in that order.

The Cement Pipeline: We determined in our February 16 order that the Cement pipeline is not a gathering line and that an evidentiary hearing was not required to make that determination. However, we failed to note that the Cement pipeline was certificated as a jurisdictional facility in *Cities Service Gas Co.*, Docket No. G-898, 6 FPC 270 (1947). Abandonment authorization has never been sought for this pipeline under section 7(b). Accordingly, we find that our determination that the Cement pipeline is an interstate pipeline was reasonable and that a hearing was not required to make this determination.

Public Convenience and Necessity: ONG contends that our determination that the proposal was in the public convenience and necessity was erroneous as there was no evidence to support our conclusions that the proposal would (1) benefit WNG and Ladd through increased revenues, (2) benefit PowerSmith through having access to competitively priced gas through Ladd, (3) benefit OG&E as OG&E would have a new source of reasonably priced electricity through PowerSmith, (4) benefit Fire-

stone as it would be able to operate its tire manufacturing processes more efficiently through steam produced by PowerSmith, (5) benefit WGN's customers due to increased throughput on WNG's system, and (6) bolster Oklahoma's economy.

We find this argument to be without merit. First, we believe that we can safely assume, as pointed out by ONG, that "[t]he benefits to PowerSmith, Ladd and Williams [WNG] are evident." [6] This leaves our finding of benefits to OG&E, WNG's customers, Firestone and the State of Oklahoma to be explained.

ONG argues that there was no showing that OG&E would purchase power from PowerSmith at any savings to OG&E. ONG states that "[t]here is no evidence in this record to show what price will be paid or what "savings" there will be to OG&E and its consumers." [7] We did not contend in our February 16 order that the PowerSmith plant would result in savings to OG&E or its customers. We merely stated that upon its completion, "OG&E will have a new source of reasonably priced electricity. . . ." [8] Under the Public Utility Regulatory Act of 1978, OG&E need not purchase electricity generated by PowerSmith if PowerSmith's rate exceeds OG&E's avoided costs.[9] Therefore, we find that our conclusion regarding OG&E was proper as OG&E will have the benefit of additional supplies of electricity available from PowerSmith but need not purchase the electricity unless PowerSmith's rates meet this requirement.

No more evidence is required to determine that the increased volumes over WNG's system due to the transportation for Ladd will benefit WNG's other customers.

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[6] Request for rehearing of ONG at p. 9.

[7] *Id* at p. 7.

[8] 46 FERC ¶ 61,160, at pp. 61,560-61.

[9] *See* 18 C.F.R. § 292.304(a)(2).

The combined rate allowed under WNG's proposal assures that no other customers will bear the cost of the new lateral and related facilities. The increased throughput on WNG's system up to the interconnection with the lateral will spread WNG's fixed costs over more volumes resulting in lower overall WNG system costs, which will ultimately be reflected in WNG's rates.

We also feel that no more evidence is necessary to determine that the cogeneration plant will be beneficial to Firestone. Firestone intervened in the original proceeding in support of the proposal and is allowing construction of the plant on its property. In fact, previous to PowerSmith's plans to construct the plant, Firestone had certified the same type of facility as a qualifying cogeneration facility in *Firestone Cogeneration Joint Venture*, 33 FERC ¶ 62,481 (1985). The only reasons evident as to why Firestone desires the construction of a cogeneration plant is to benefit from reduced operating costs and increased efficiency through purchasing steam produced by the plant.

Further, from the evidence presented, we find that it was reasonable to conclude that the proposal would benefit the residents of Oklahoma. Clearly, the construction and operation of the cogeneration plant will bring more jobs and increased revenues to the State. Further, Firestone stated in its original intervention that the proposal would help it remain more competitive in the tire manufacturing industry. ONG offers nothing substantial in contradiction of these conclusions.

Finally, ONG contends that the plant would still be constructed even if WNG was not authorized to construct the lateral to serve PowerSmith as PowerSmith would then have merely purchased gas from ONG. However, locking PowerSmith into gas supplied from ONG would not coincide with our policy of giving gas consumers greater gas supply alternatives in the absence of some showing of unfair competition.

ONG contends that our decision totally ignores the detriment imposed upon ONG and its customers throughout the state due to the bypass of its system by WNG. ONG contends that it will lose Firestone as a customer and will lose the benefit of supplying PowerSmith, the result being that its customers rates will increase due to its fixed costs being spread over less gas volumes.

ONG has lost an opportunity to serve a new customer —PowerSmith. While ONG and its customers will not realize the benefits of serving this customer, ONG will be no worse off as it has never served PowerSmith. Further, ONG has not presented any evidence that the proposal will result in ONG's claimed loss of gas sales to Firestone. We find that ONG's allegation of losing gas sales to Firestone is merely speculative.

For these reasons, we find that there was sufficient evidence presented to conclude that WNG's proposal was required by the public convenience and necessity.

Bypass Policy: ONG contends that we departed without adequate justification from our policy of protecting LDC's from bypass where an LDC is able to provide the service. As pointed out by ONG in its request for rehearing, "[t]he Commission recently has chosen in its orders permitting bypass, to ignore the impact of any particular bypass on the distribution company, which, by law, must continue to serve all customers in its franchise area at rates regulated by the state commission, as well as on the public served by that company." [10] While ONG's account is not entirely complete,[11] it correctly recognizes that our bypass policy has evolved and no longer shows

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[10] ONG's request for rehearing at p. 11.

[11] ONG fails to note that we will not permit bypass where there is evidence of anticompetitive or discriminatory behavior on the part of the interstate pipeline. *See Panhandle Eastern Pipe Line Co.*, 29 FERC ¶ 61,338 (1984), at p. 61,709, and cases cited therein.

a preference for LDC's. In our February 16 order, we stated that

> We realize that authorizing the construction of the lateral will result in the gas being transported directly to an end-user located in ONG's distribution area. However, we are reluctant to shield local distribution companies from the forces of competition which we have attempted to foster in the natural gas industry. This is especially true in light of the facts in the instant case. ONG has been unsuccessful in its attempts to compete for a new customer. However, in the absence of any evidence of unfair competition, we see no reason to depart from our belief that the public interest is best served by allowing the market to determine who will provide service in cases such as this.

Subsequent to our February 16 order in the instant case, we further clarified our new bypass policy and our reasons for it in *Williams Natural Gas Co., et al.*, 47 FERC ¶ 61,080 (1989). In that order we stated that

> In the past, we have indicated a preference for industrial customers by LDCs where LDCs were capable of providing the service. [Footnote omitted.] Circumstances in the industry have changed, however. With the phased deregulation of wellhead prices has come a greater reliance on competition and market forces to ensure adequate supplies of gas will be available to consumers at the lowest reasonable cost. Accordingly, we allowed the bypass of LDCs by interstate pipelines in recent cases where there were no indications that the proposed service was the result of any discriminatory behavior. These decisions have been based upon a belief that on a national level, natural gas consumers are better served by a competitive natural gas market which encourages improved services at lower costs. [Footnote omitted.]

> Our current policy is to encourage access between willing buyers and sellers of natural gas in an atmosphere of fair competition. The goal of this policy is to provide incentives that allow all shippers, including LDCs, to benefit from the competitive wellhead market created by the Natural Gas Policy Act of 1978. Under this policy, LDCs are not sheltered from competition any more than other segments of the market. Instead, they are encouraged to choose from a variety of sources of competitively priced gas in order to keep their retail prices competitive. Thus, in the absence of some evidence of unfair competition (*e.g.*, price squeeze or undue discrimination), we are disposed to allow freely negotiated transactions to go forward, even where to do so results in the bypass of a local distributor.

As there was no showing in the instant case of anticompetitive or unduly discriminatory behavior, we find that there was sufficient justification under this new policy to allow WNG to serve PowerSmith in ONG's distribution area.

ONG asserts several arguments not addressed in our February 16 order. First, ONG contends that we erred by not deferring our determination on WNG's proposal until the Oklahoma State Court proceeding initiated by ONG under the Oklahoma franchise law is determined. We find no merit to this argument. As previously indicated, a determination by the state court as to whether or not WNG requires authorization under the franchise law to install the pipeline in Oklahoma City has no bearing on our determination of whether the lateral is in the public convenience and necessity. Should the state court determine that WNG needs authorization under the franchise law, the issue will be whether or not that determination is preempted by our certificate authorization.

Second, ONG asserts that we erred by failing to determine whether the intent of WNG is to ultimately

transfer the lateral to PowerSmith or Ladd and why the parties entered into option agreements providing for alternate construction plans of an intrastate nature after WNG's application was filed. We find these arguments unpersuasive. In order for WNG to transfer the lateral to either Ladd or PowerSmith, it would first have to obtain abandonment authorization under section 7(b) of the NGA. Any issues relating to the transfer would be determined in that proceeding. As for the subsequent intrastate option agreements, these alternatives are immaterial to a determination in the instant proposal.

Third, ONG asserts that we failed to follow Commission policy of denying flexible receipt point authority to interstate pipelines seeking to transport gas in section 7(c) proceedings.[12] ONG relies on our decisions in *Southern Natural Gas Co.*, 36 FERC ¶ 61,275 (1986), and in *Arkla Energy Resources*, 45 FERC ¶ 61,375 (1988), and cases cited therein. ONG's attempted reliance on these decisions is misplaced under the facts in the instant case. In those cases, the applicants sought specific section 7(c) transportation authorization and flexible receipt point authority. WNG does not seek authorization to transport gas in the instant case. Rather, WNG is seeking authorization to construct the lateral so that it can transport gas to PowerSmith under WNG's section 284.221 blanket transportation certificate. One of the benefits of the blanket certificate is that it carries with it flexible receipt point authority.

Finally, ONG asserts that we erred by protecting the private interests of WNG, PowerSmith and Ladd, as opposed to the public interest in allowing the bypass. For the reasons discussed above concerning bypass, we find that the public interest is best served by allowing this

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[12] ONG originally asserted this argument in a supplement to its intervention and protest filed in CP89-93-000. We found this supplement to be an improper filing under Rule 213(a)(2) and therefore did not entertain the arguments raised therein.

competitive arrangement to go forward rather than by forcing PowerSmith to obtain its required gas from a single LDC.

For the above reasons, ONG's request for rehearing is denied.

WNG's Request for Rehearing

WNG disagrees only with our determination that the Rate Schedule X-23 rate be limited to .73 cent per Mcf after the lump-sum payment is made. WNG asserts that the Commission erroneously concluded that WNG would fully recover the costs of the facilities after the lump-sum payment is made after three years of service and, therefore, erred in limiting the X-23 transportation rate to .73 cent at that time.

We agree that WNG should be allowed to recover its out-of-pocket facility costs for the lateral through transportation revenues collected from Ladd through the Rate Schedule X-23 rate. Our reason for limiting the X-23 rate after the lump-sum payment is made to .73 cents per Mcf is to prevent WNG from any double recovery in the event the payment completely covers the cost of the facilities. In the event the payment does not fully recover WNG's costs of the lateral, it will be necessary for WNG to file under section 4 at the time as it is not possible to set that rate at this time. Our February 16 order took this possibility into consideration by stating that the X-23 rate would be limited to .73 cent unless WNG filed to change the rate after the lump-sum payment is made. Therefore, WNG's request for rehearing is denied.

The Commission orders:

The requests for rehearing filed by ONG and WNG in Docket No. CP89-93-000 are denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-6209, 89-6227, 89-6228

WILLIAMS NATURAL GAS COMPANY, a Utah corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma corporation;
POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiff-intervenor-Appellant,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendant-Appellee.

ORDER

Filed December 27, 1989

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Holloway did not participate in consideration of the petition.

Entered for the Court

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
By PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-6209, 89-6227, 89-6228

WILLIAMS NATURAL GAS COMPANY, a Utah corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma corporation;
POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiff-intervenor-Appellant,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendant-Appellee.

ORDER

Filed January 5, 1990

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, Circuit Judges.

The Court, in order to correct a clerical error in the issuance of this order on December 27, 1989, hereby reissues it in order to reflect that Judge Ebel did not participate in the issuance of the order.

The order reissued nunc pro tunc with the above list of judges, and reads as follows:

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judges Holloway and Ebel did not participate in the issuance of the order.

Entered for the Court

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
By PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-6209, 89-6227, 89-6228

WILLIAMS NATURAL GAS COMPANY, a Utah corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma corporation;
POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiff-intervenor-Appellant,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendant-Appellee.

ORDER

Filed January 12, 1990

Before McKAY, LOGAN and BRORBY, Circuit Judges.

This matter comes on for consideration of appellees' motion for a stay of mandate pending application to the Supreme Court for writ of certiorari.

Upon consideration whereof, it is ordered that issuance of the mandate in the captioned appeal is stayed until

February 12, 1990, and that if on or before that date there is filed with the Clerk of this Court a notice from the Clerk o[f] the Supreme Court that appellant has filed a timely petition for the writ in that court, the stay shall continue until final disposition in the Supreme Court.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX F

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY, a division of ONEOK INC., a Delaware corporation,
Plaintiff,

vs.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, a Delaware limited partnership; WILLIAMS NATURAL GAS COMPANY, a Delaware corporation; and LADD PETROLEUM COMPANY, a Delaware corporation,
Defendants.

PETITION FOR DECLARATORY JUDGMENT

Comes now the plaintiff, Oklahoma Natural Gas Company, a division of ONEOK Inc. ("Oklahoma Natural"), and alleges and states:

1. The plaintiff is a Delaware corporation authorized to operate in Oklahoma. Oklahoma Natural, which is a division of ONEOK Inc., is a gas public utility engaged in furnishing natural gas to more than 265 communities in Oklahoma, serving in excess of 644,000 residential, commercial and industrial customers. Its utility operations and its rates, services, practices and charges in connection therewith are subject to general regulation by the Oklahoma Corporation Commission. Oklahoma Natural's principal office is located at 100 West Fifth Street, P. O. Box 871, Tulsa, Oklahoma 74102.

2. The defendant, Smith Cogeneration, Inc. ("Smith"), an Oklahoma corporation, is general partner of the defendant, PowerSmith Cogeneration Project ("PowerSmith"), which is a Delaware Limited Partnership. The principal office of Smith and PowerSmith is 210 West Park Avenue, Suite 810, Oklahoma City, Oklahoma 73102.

3. The defendant, Williams Natural Gas Company ("Williams") is a subsidiary of The Williams Companies, Inc., which is a Delaware corporation authorized to do business in the State of Oklahoma. The principal office of Williams is One Williams Center, Tulsa, Oklahoma 74103. Williams is in the business of purchasing, transporting and marketing natural gas in interstate commerce, and has part of its pipeline facilities located in Oklahoma County, Oklahoma.

4. The defendant, Ladd Petroleum Company ("Ladd"), a Delaware corporation, is a subsidiary of General Electric Corporation, a Delaware corporation authorized to do business in the State of Oklahoma. The principal office of Ladd in the State of Oklahoma is 321 South Boston Avenue, Tulsa, Oklahoma 74103.

5. Oklahoma Natural operates within the city limits of The City of Oklahoma City, Oklahoma ("Oklahoma City"), providing gas service to residential, commercial and industrial customers. It is authorized to use the streets, alleys and other public rights of way within the limits of Oklahoma City for the purpose of laying pipelines and installing other equipment necessary to transmit and deliver natural gas to customers within the city limits in accordance with a Franchise Agreement ("Franchise" or "Agreement") dated April 24, 1985, which Agreement has been approved by the citizens of Oklahoma City. Section 2 of the Franchise provides:

> *Section 2.* There is hereby granted to Oklahoma Natural Gas Company, a division of ONEOK Inc., a

> corporation, its successors and assigns, for a period of twenty-five years from the passage and approval of this Ordinance and its acceptance by the Grantee, the right to acquire, construct, erect, install, extend, repair, remove, relocate, replace, operate and maintain a system of works, pipes, pipelines, apparatus, structures and appurtenances in, across, upon and under the streets, alleys, avenues, boulevards, lanes, parks, parkways, sidewalks, parkings, driveways, rights of way, utility easements, and other public ways, places, areas and grounds, all being sometimes referred to herein as "streets, alleys, avenues, and other public ways, places and grounds," in The City of Oklahoma City, Oklahoma, as now constituted, and as may be added to hereafter, for the purpose of transporting, distributing and selling gas to said City, its inhabitants and the public generally for domestic, commercial and industrial uses, and for any and all other purposes for which gas, during the period of this grant, may be used, together with the right to enter upon the streets, alleys, avenues and other public ways, places and grounds of said City for the purpose of constructing, maintaining, removing and repairing said works, pipes, pipelines and all necessary apparatus, machinery, structures and appurtenances.

That Franchise Agreement is for a period of twenty-five years, terminating April 24, 2010.

6. PowerSmith is a limited partnership currently constructing an $80 million cogeneration facility at the Oklahoma City Firestone Plant located at 2500 South Council Road, which is within the city limits of Oklahoma City ("Firestone Project").

7. PowerSmith has contracted with Ladd to provide the natural gas requirements of the Firestone Project. Ladd has entered into certain gas purchase contracts

with gas producers in the State of Oklahoma in order to fulfill some or all of those requirements.

8. Williams is an interstate natural gas pipeline company. Ladd has contracted with Williams to transport certain natural gas supplies purchased by Ladd within the State of Oklahoma to PowerSmith's Firestone Project. In order to deliver such gas to the Project, Williams must construct a pipeline system under various streets, alleys and other public rights of way within the city limits of Oklahoma City.

9. Neither Williams nor Ladd nor PowerSmith have a franchise nor intend to obtain one from Oklahoma City in order to use the streets, alleys and other public rights of way within the City.

10. A justiciable issue exists whether it is necessary for Smith, PowerSmith, Williams or Ladd to first obtain a franchise from Oklahoma City prior to using the streets, alleys and other public rights of way for the purpose of laying pipelines and the transmission of natural gas when another entity, in this case, Oklahoma Natural, already possesses a Franchise from Oklahoma City for that same use and purpose.

11. All persons or entities who have or claim any interest which would be affected by the judgment entered in this case have been made parties and a judgment in this case will not prejudice the rights of persons not parties to this proceeding.

12. The Firestone Project currently being constructed by PowerSmith is scheduled for initial completion on January 31, 1989. At that time, PowerSmith will need gas service for a six-month testing period. In order to avoid any delays in PowerSmith's obtaining the gas supply required to operate the Project, it is necessary to determine the rights which Oklahoma Natural possesses as a result of the Franchise which it has obtained from

Oklahoma City. If a judgment is not rendered by this Court at the soonest possible date, substantial damages may result to PowerSmith as a result of the ensuing delay until a determination is reached by this Court concerning Oklahoma Natural's rights under the Franchise.

13. Neither plaintiff nor any of the defendants have sought by any other legal action to have adjudicated their respective rights under said Franchise, and plaintiff is extremely desirous of having this Court act under this petition and construe said Franchise, thereby finally terminating the controversy now existing and avoiding any damages which might be incurred for wrongful delay of PowerSmith's obtaining gas service to its Firestone Project.

WHEREFORE, an actual controversy of a justiciable nature existing, plaintiff prays that this Court, in order to relieve plaintiff of the present uncertainty and insecurity with regard to its rights arising out of said Franchise, to avoid damages to defendant PowerSmith which may be caused due to a delay, and to bring an end to the controversy:

(a) Enter a declaratory judgment construing the rights which plaintiff, Oklahoma Natural, possesses as a result of its Franchise with Oklahoma City; and

(b) Enter a declaratory judgment stating defendants, Smith, PowerSmith, Williams and Ladd, have no right to, and indeed cannot, use any of Oklahoma City's streets, alleys or other public rights of way for the purpose of laying pipelines and other equipment necessary for the transmission of natural gas to defendant PowerSmith's Firestone Project without first obtaining a franchise from Oklahoma City.

HUFFMAN ARRINGTON KIHLE
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IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY,
a division of ONEOK Inc., a Delaware corporation,
Plaintiff,

vs.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, A Delaware limited partnership; WILLIAMS NATURAL GAS COMPANY, a Delaware corporation; and LADD PETROLEUM CORPORATION, a Delaware corporation,
Defendants.

[Filed Dec. 6, 1988]

AMENDED ANSWER OF DEFENDANTS WILLIAMS NATURAL GAS COMPANY AND LADD PETROLEUM CORPORATION

Come now Williams Natural Gas Company, a Delaware corporation (WILLIAMS), and Ladd Petroleum Corporation, a Delaware corporation, (LADD), defendants, by leave of court first obtained, and for their amended answer to the petition of plaintiff deny generally and specifically each and every allegation therein contained, except such as may be hereinafter admitted.

For further answer and defense, said defendants allege and state:

1. Defendants admit the allegations of paragraphs 1, 4, 5, 6, and 9 of the Petition.

2. As to paragraph 2 of the Petition, defendants admit that defendant Smith Cogeneration, Inc., is the managing general partner of PowerSmith Cogeneration Joint Venture, a partnership, which is a general partner of defendant PowerSmith Cogeneration Project, Limited Partnership, (POWERSMITH).

3. Defendants deny only the first sentence of paragraph 3 of the petition and allege that WILLIAMS is a subsidiary of Northwest Energy Company, a Utah corporation, which is a subsidiary of The Williams Companies, Inc., a Delaware corporation, authorized to do business in the State of Oklahoma.

4. Defendants deny the allegations of paragraphs 7, 8, 10 and 11 of the petition to the extent that they are inconsistent with the following allegations:

(a) That by the enactment of 15 U.S.C. § 717, et seq., (the Natural Gas Act), the Congress preempted the regulation of natural gas companies engaged in the transportation of natural gas in interstate commerce, including the transportation of natural gas to the Firestone Project as contemplated by WILLIAMS here.

(b) POWERSMITH has contracted for the purchase of natural gas from (LADD) at facilities located outside the city limits of Oklahoma City that are connected with the interstate transportation system of WILLIAMS. LADD's interest in said contract was thereafter assigned to Ladd Gas Marketing, Inc., a Colorado corporation (LGMI), a wholly-owned subsidiary of LADD.

(c) WILLIAMS has agreed with POWERSMITH and LADD to transport the gas through its existing lines from a point or points located outside the city limits of Oklahoma City to a point inside the city

limits of Oklahoma City located approximately 12 miles from the Firestone Project. WILLIAMS has further agreed, subject to obtaining approval from THE Federal Energy Regulatory Commission (FERC), to construct a new 12 mile extension from its existing line to the Firestone Project and to transport the gas through such line to the Firestone Project. Construction of the extension line will require WILLIAMS to cross Oklahoma City streets at several points. The agreement with WILLIAMS is for transportation services only and does not involve the sale of gas from WILLIAMS to either POWERSMITH, LADD or LGMI.

(d) In order to perform this transportation service, WILLIAMS has applied to the FERC under Section 7(c) of the Natural Gas Act (NGA) for a certificate of public convenience and necessity, authorizing the construction and operation of the facilities necessary to provide transportation services to the Firestone Project. Such application is now pending in Docket No. CP 89-93-000 and has not yet been acted upon by FERC. Under FERC rules and regulations, plaintiff has the right, if done on or before November 29, 1988, to intervene before FERC and object to the granting of WILLIAMS' application. If the application is granted and the certificate is issued, WILLIAMS will have the power of eminent domain, pursuant to provisions of the Natural Gas Act, to condemn any interest in real estate, including city streets, necessary to construct the pipeline, irrespective of plaintiff's franchise, and subject only to compliance with environmental, safety and similar requirements of local concern of the City of Oklahoma City. Moreover, WILLIAMS already is authorized, by virtue of certificate authority obtained from the FERC in Docket No. RP-86-32-009 et al, to provide non-discriminatory gas transportation anywhere on its system on behalf of shippers, including Smith and Ladd. The rights of WILLIAMS to provide,

and of SMITH and LADD to receive, gas transportation services to the Firestone Project in Oklahoma City, notwithstanding plaintiff's franchise, are matters that FERC has decided or will decide in the above-numbered dockets.

(e) WILLIAMS denies that the franchise requirements alleged by plaintiff govern the pipeline contemplated here for the following reasons:

(1) WILLIAMS proposes to obtain the right to cross some city streets by either obtaining permission from Oklahoma City by permit (rather than by franchise) by or condemning the necessary [facilities] pursuant to the Natural Gas Act. The City of Oklahoma City has enacted ordinances, specifically sections 37-201 through 241, which authorize construction of a pipeline by either permit or franchise, whichever WILLIAMS chooses. A true and correct copy of said ordinance is attached hereto as Exhibit "A" and made a part of this answer. The limited use of city streets for the purpose of transporting gas to one end user is not the type of activity requiring a vote of the citizens of Oklahoma City to grant a franchise. Construction of the pipeline by permit rather than by franchise is permissible and provided for by the ordinances of the City of Oklahoma City.

(2) The pipeline contemplated by WILLIAMS is not a "system" as alleged by plaintiff, but a single pipeline.

(3) Plaintiff's franchise is not for the same use and purpose of the streets, alleys and rights of way of the City of Oklahoma City as WILLIAMS intends to make thereof, in that plaintiff's use is for the purpose of transporting, distributing and selling gas to said City, its inhabitants and the public generally, and WILLIAMS' use is for the transportation only of natural gas to the Firestone Project.

5. To the extent that WILLIAMS' application to FERC, as described above, may be considered a legal action to determine defendants' rights with regard to any controversy with plaintiff, the allegations of paragraph 13 of said petition are denied.

6. In addition to transporting gas in Oklahoma City for sale to the public, plaintiff is now and has been transporting gas in Oklahoma City on behalf of sellers other than plaintiff, for which plaintiff pays no revenue to the City of Oklahoma City, asserting that such transportation does not come within the terms and provisions of its franchise, and plaintiff is therefore estopped to assert that WILLIAMS' transportation is an activity for which a franchise is required.

7. That these defendants claim no rights under plaintiff's franchise and that plaintiff has no standing to bring this action.

8. That plaintiff's petition fails to state a claim on which relief can be granted.

WHEREFORE, having fully answered, defendants pray that plaintiff take nothing by its petition and that they be discharged with their costs, and for such other and further relief as may be equitable and proper.

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Attorneys for Defendants
Williams Natural Gas Company
and Ladd Petroleum Corporation

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 6th day of December, 1988, a true and correct copies of the above and foregoing AMEND ANSWER OF DEFENDANTS WILLIAMS NATURAL GAS COMPANY AND LADD PETROLEUM CORPORATION were hand delivered to:

Messr. John A. Gaberino, Jr., Donald A. Kihle
and Curtis M. Long
1000 ONEOK Plaza
Tulsa, Oklahoma 74103

and

Messrs. Burck Bailey, Harry H. Selph II,
and Thomas J. Enis
2400 First National Center
Oklahoma City, Oklahoma 73102
Attorneys for Plaintiff.

Mr. S. Paul Hammons
Andrews Davis Legg Bixler Milsten & Murrah
500 West Main
Oklahoma City, Oklahoma 73102
Attorneys for Defendants Smith Cogeneration, Inc.
and PowerSmith Cogeneration Project.

/s/ William R. Burkett
WILLIAM R. BURKETT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 89-519T

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA
a municipal corporation, and
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendants.

[Filed Mar. 28, 1989]

COMPLAINT

COMES NOW the plaintiff, Williams Natural Gas Company, a Delaware corporation, ("WILLIAMS") and alleges and states:

1. The plaintiff is a subsidiary of Northwest Energy Company, a Delaware corporation, which is a subsidiary of The Williams Company, Inc., a Delaware corporation authorized to do business in the State of Oklahoma. WILLIAMS is in the business of purchasing, transporting and marketing natural gas in interstate commerce.

2. Defendant, the City of Oklahoma City, Oklahoma ("OKLAHOMA CITY") is a municipal corporation and is the owner of certain property within its city limits.

3. The defendant, Oklahoma Natural Gas Company, ("ONG"), is a Delaware corporation authorized to do business in Oklahoma. ONG transports, distributes and sells gas to Oklahoma City, its inhabitants and the public generally within the city limits of Oklahoma City, Oklahoma.

FIRST CAUSE OF ACTION

VENUE AND JURISDICTION

4. This Court has jurisdiction over Count I of this action pursuant to 28 U.S.C. 1331 in that this case arises under The Natural Gas Act, 15 U.S.C. § 717 et seq. and the value of the property to be condemned exceeds $3,000.00.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

CLAIM FOR RELIEF

6. The plaintiff herein has the power of eminent domain pursuant to the provisions of The Natural Gas Act, to condemn any interest in real estate including city streets.

7. PowerSmith Cogeneration Joint Venture ("PowerSmith"), a partnership, has contracted for the purchase of natural gas from Ladd Petroleum Company at facilities located outside the city limits of Oklahoma City and which are connected at the interstate transportation system of WILLIAMS. WILLIAMS has agreed with PowerSmith and Ladd to transport the natural gas through its existing lines from points located outside the city limits of OKLAHOMA CITY to a point inside the city limits of OKLAHOMA CITY located approximately 12 miles from the Oklahoma City Firestone Plant located at 2500 South Council Road.

8. Pursuant to the above agreement, WILLIAMS has obtained a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission

("FERC") authorizing it to construct, own and operate a 12.4 mile pipeline and related facilities for the purpose of transporting natural gas from Williams existing facilities to the cogeneration plant currently being constructed by PowerSmith. (See certificate attached hereto as Exhibit "A").

9. That under the above Certificate of Public Convenience and Necessity, the facilities must be completed and placed in actual operation within six (6) months from the date of the FERC Certificate. In order to comply with the orders issued under the FERC Certificate, plaintiff is required to lay a pipeline on the land belonging to the defendant, Oklahoma City, which land is described more particularly on the attached Exhibit "B".

10. For the purpose set forth in the FERC Certificate (Exhibit "A"), including the building, laying, maintaining, operating and removing pipelines for the transportation of natural gas, plaintiff necessarily requires the taking, expropriating, condemning and acquiring of a right-of-way and easement over and across the following streets of the defendant, Oklahoma City:

(a) Across south Meridian Avenue in Sections 26 and 27, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-1.

(b) Across southwest 149th Street in Sections 22 and 27, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-2.

(c) Across southwest 134th Street in Sections 15 and 22, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-3.

(d) Across south Rockwell Avenue in Sections 16 and 17, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-4.

(e) Across southwest 119th Street in Sections 8 and 17, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-5.

(f) Across southwest 104th Street between Sections 5 and 8, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-6.

(g) Across southwest 89th Street in Section 5, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-7.

(h) Across southwest 74th Street in Sections 29 and 32, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-8.

(i) Across southwest 59th Street between Sections 20 and 29, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-9.

(j) Across southwest 44th Street and Campbell Creek in Sections 17 and 20, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-10.

(k) Across southwest 29th Street in Sections 8 and 17, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing, attached hereto as Exhibit B-11.

11. Plaintiff's acquiring and using a right-of-way easement as described hereinabove across Oklahoma City's property will not materially or substantially interfere with Oklahoma City's use of said property.

12. Because of the construction deadlines contained in Exhibit A, plaintiff is ready to commence construction of said pipeline, and delay in said construction would cause irreparable harm; plaintiff's only remedy is this condemnation proceeding and plaintiff therefore is entitled to the equitable relief of immediate possession of the easements here sought.

13. Defendant, Oklahoma City, should be required to appear and set forth what claim, if any, it now has in and to the real property described herein.

WHEREFORE, plaintiff prays for judgment that the property described above be condemned, that plaintiff be given immediate possession of said property, that just compensation for said taking be ascertained and awarded and for such other and further relief as may be equitable and proper.

SECOND CAUSE OF ACTION

VENUE AND JURISDICTION

14. This Court has ancillary jurisdiction, under 28 U.S.C. § 1331, to adjudicate all matters incident[al] to the exercise of primary jurisdiction under said statute.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

CLAIM FOR RELIEF

For its cause of action against the defendant, ONG, Williams alleges and states that:

16. Pursuant to a franchise ordinance enacted by the City of Oklahoma City, Oklahoma on April 24, 1985, ONG was granted the right to construct and operate pipelines across, upon and under all the streets of Oklahoma City for the purpose of transporting, distributing and selling gas to the inhabitants of Oklahoma City.

17. ONG claims that such franchise grants it the exclusive right to use Oklahoma City streets for the purpose of transporting gas to consumers in Oklahoma City and has asserted said claim in the District Court of Oklahoma County, Oklahoma, in the case of *Oklahoma Natural Gas Company v. Smith Cogeneration, et al.*, No. CJ-88-10553, in which case said Court has entered an interlocutory order, not yet filed, generally to the effect that under state law, plaintiff may not use said streets to transport gas through a pipeline without a franchise, said Court not having ruled on whether plaintiff's proposed operation of said pipeline is a field pre[e]mpted by the Federal Government. Such claim by ONG is adverse to plaintiff's right to use such property for the purposes set forth in the Certificate of Public Convenience and Necessity issued by FERC to plaintiff. ONG's claim is a cloud on the title plaintiff will obtain by condemnation and is invalid because the transportation of gas by an interstate pipeline is a field preempted by the Federal Government under the Natural Gas Act, 15 U.S.C. 717, et seq.

WHEREFORE, plaintiff prays that it have judgment against the defendant, Oklahoma Natural Gas Company, adjudging that plaintiff is the owner of the above described property once condemned; adjudging that Oklahoma Natural Gas Company's claim of the right to use such condemned property to the exclusion of the plaintiff

until such time as plaintiff also obtains a franchise from Oklahoma City is null and void; adjudging that Oklahoma Natural Gas Company be barred and enjoined from asserting any right, claim or interest in such condemned property adverse to plaintiff and adverse to plaintiff's operation of said pipeline under the authority of said FERC order; adjudging that the title of plaintiff in such condemned property be quieted and confirmed; and granting plaintiff such other and further relief as the Court shall deem just and proper.

HALL, ESTILL, HARDWICK, GABLE,
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APPENDIX H

The Natural Gas Act, as amended, 15 U.S.C. § 717 *et seq.*, states in pertinent part:

Section 1, 15 U.S.C. § 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the

rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 7, 15 U.S.C. § 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) (1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested

persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found

that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) (1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

* * * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 19, 15 U.S.C. § 717r. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for

rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX I

The Full Faith and Credit Act, 28 U.S.C. § 1738, states:

> **State and Territorial statutes and judicial proceedings; full faith and credit**
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

The Anti-Injunction Act, 28 U.S.C. § 2283, states:

> **Stay of State court proceedings**
>
> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or affectuate its judgments.

The Oklahoma Declaratory Judgment Act, 12 Okla. Stats. 1981, § 1651, states:

Determination of rights, status or other legal relations—Exceptions

District courts may, in cases of actual controversy, determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of any foreign judgment or decree, deed, contract, trust, or other instrument or agreement or of any statute, municipal ordinance, or other governmental regulation, whether or not other relief is or could be claimed, except that no such declaration shall be made concerning liability or nonliability for damages on account of alleged tortious injuries to persons or to property either before or after judgment or for compensation alleged to be due under workers' compensation laws for injuries to persons or concerning obligations alleged to arise under policies of insurance covering liability or indemnity against liability for such injuries. The determination may be made either before or after there has been a breach of any legal duty or obligation, and it may be either affirmative or negative in form and effect; provided however, that a court may refuse to make such determination where the judgment, if rendered, would not terminate the controversy, or some part thereof, giving rise to the proceeding.

Article 18, § 5(a), of the Oklahoma Constitution states:

FRANCHISES

Grant, extension or renewal—Approval by voters —Term

No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a

majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days' notice; and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years.

Article 18, § 7, of the Oklahoma Constitution states:

Control and regulation not divested—Surrender of powers—Exclusive franchises

No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment.

Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted.